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CONTAINING ALL THE DECISIONS AS FAST AS FILED

OF THE FOLLOWING COURTS:

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WEST COAST REPORTER.

WHOLE No. 97. NOVEMBER 5, 1885. VOL. VIII. No. 1.

SUPREME COURT OF ARIZONA.

WILLIAMS *v.* TIDBALL ET AL.

Filed October 24, 1885.

UNITED STATES MARSHAL—DEFENDANT DESCRIBED BY FICTITIOUS NAME—ARREST.—A United States marshal is justified in making the arrest of a defendant, within his territory, who is described in the warrant by a fictitious name. The marshal assumes only the risk, in execution of such a warrant, of arresting the right person.

THE SAME—UNITED STATES COMMISSIONER MAY ISSUE WARRANT FOR OFFENSE COMMITTED OUT OF DISTRICT.—Such marshal is protected and justified in making an arrest by virtue of a warrant issued by a United States commissioner, although the latter did not reside in the judicial district where it was alleged on the face of the warrant and complaint the offense was committed.

APPEAL from a judgment of the district court. The opinion states the facts.

Zabriskie & Anderson, for the appellants.

Thomas Mitchell, for the respondent.

HOWARD, C. J. The only questions presented by the record in this case were, first: Is the United States marshal justified in making the arrest of a defendant within his territory, who is described in the warrant by a fictitious name. We hold that he is, and that the marshal assumes only the risk and responsibility in execution of such a warrant of arresting the right man. If the marshal acts in good faith and exercises due care the defendant cannot complain. In this case it is not contended that the marshal arrested the wrong man. It is apparent that the respondent was the man complained of, and against whom the complaint was filed, although designated by a fictitious name. The suit against the marshal for false imprisonment, based upon the fact that defendant was not described in the warrant by his correct name, cannot be maintained. Sec. 1,014, R. S. U. S., with sec. 89 of chap. 2, C. S. of Arizona, settle this question clearly in favor of the justification of the appellant in making the arrest.

The second and only remaining question presented by the record is involved in the fact that the United States commissioner, who issued the warrant, did not reside in the judicial district where it was alleged on the face of the warrant and complaint, the offense was committed. We hold in the reversal of the judgment in this case that the United States marshal was protected and justified in

making arrest by virtue of such a warrant. While it is true as a matter of proper practice that commissioners should in ordinary cases confine the exercise of their jurisdiction to the geographical limits of their district, yet, the plain interpretation of the statute: U. S. R. S., sec. 1,014; in cases for the violation of the acts of the federal congress, clearly confers power upon the officers enumerated to issue warrants. This provision, when taken in connection with the other acts of congress applicable to the jurisdiction of United States commissioners, clearly expresses the intent of congress to confer upon commissioners jurisdiction co-extensive with the limits of the territory or state. By no act of congress has this power been limited to the geographical limits of the district or county where such commissioner may reside. The warrant, by virtue of which the arrest was made, being regular on its face, was a protection to the officer executing it. For these reasons the judgment of the court below is reversed, and the case remanded to the trial court for new trial.

FITZGERALD, J., concurred.

SUPREME COURT OF MONTANA.

GARFIELD M. & M. CO. *v.* HAMMER ET AL.

Filed August 15, 1885.

MINING CLAIM—LOCATION—RIGHT OF POSSESSION.—The right to the possession of a mining claim is derived only from a valid location; consequently, if there be no location there can be no possession under it. A location is not made by taking possession alone, but by marking on the ground, recording and doing whatever else is required for that purpose by the acts of congress and the local laws and regulations.

THE SAME—PLAINTIFF MUST PROVE VALID LOCATION—FORFEITURE.—In an action to quiet title to a mining claim, where the plaintiff's ownership and right to the possession are put in issue by the answer, it devolves upon him to show affirmatively upon the trial that he had complied fully with all the requirements of the act of congress, and the local rules and regulations relative to the location of mining claims, and had made a valid location. An instruction, however, to the contrary, is not a prejudicial error, if the defendant did not introduce any evidence tending to invalidate the plaintiff's location, and relied simply upon an alleged forfeiture.

THE SAME—LOCATORS PRESUMED TO BE CITIZENS.—In the absence of evidence to the contrary, the locators of a mining claim will be presumed to be citizens of the United States, or to have declared their intention to become such.

THE SAME—DESCRIPTION OF CLAIM IN NOTICE.—A notice of location of a mining claim which describes it by metes and bounds, and as being a certain number of feet south from a well known quartz location, sufficiently complies with the requirements of the act of congress, as to the description.

NEW TRIAL—CUMULATIVE EVIDENCE.—A new trial will not be granted on the ground of newly discovered evidence, if the same be merely cumulative.

CERTIFIED COPIES OF RECORDED DOCUMENTS ADMISSIBLE IN EVIDENCE.—Under the statutes of Montana, certified copies of the certificate of incorporation of a corporation, of the declaratory statement under oath of the locators of a mining claim, and of deeds, are admissible in evidence, without first accounting for the original.

EVIDENCE—EXPERT TESTIMONY—OPINION AS TO WORK ON MINE.—A witness, not shown to be a mining expert, cannot testify whether, in his opinion, any work had been done on the shaft of a mine, within a given period.

FOREIGN CORPORATIONS ARE NOT PROHIBITED FROM DOING BUSINESS in Montana.

APPEAL from a judgment of the third district court of Lewis and Clarke county. The opinion states the facts.

E. W. & J. K. Toole, for the appellants.

Sanders, Cullen & Sanders, for the respondent.

GALBRAITH, J. This is an appeal from an order overruling a motion for a new trial. The action was to quiet title. A trial by a jury was had between the respondent and the appellant Hammer. The pleadings, so far as they were concerned, were in substance as follows: The complaint alleged that the respondent "is a body politic and corporate" organized under the laws of the state of New York, for the purpose of mining and milling ores containing the precious metals in Montana territory, and that it has complied with the laws of that territory in relation to foreign corporations. That it is the owner of a certain quartz lode mining claim, situate in "Vaughn (unorganized) Mining District" in the county of Lewis and Clarke, territory of Montana, called the Garfield lode or mining claim. That the respondent is now in the possession of the above claim, and that plaintiff and its predecessors in interest have been ever since the discovery and location of said claim, in possession of the same and entitled to be so in possession thereof.

That the appellant Hammer, on or about the first day of January, 1883, assumed to enter upon said premises, and to relocate the same, and had the relocation recorded in the county of Lewis and Clarke as the Kinna lode, and thereby now claims an interest therein and the possession thereof adversely to the respondent, and has made application for a patent to the premises under the name of the Kinna lode. That the claim of the appellant is without any right whatever. That the respondent has filed its adverse claim in the land office, whereby proceedings will be stayed till the final determination of the right to the premises. The answer denies that the respondent ever was, or is, a body politic and corporate, or that it has duly complied with the laws of Montana territory relative to foreign corporations. Denies that the respondent is the owner of the premises, or that it is now, or ever was, in the possession thereof, or that it, or its predecessors in interest, have been ever since the discovery or location thereof, in possession of the same; or are, or were, entitled to such possession; or that he assumed to relocate the said premises, or caused any location thereof to be recorded as the Kinna lode, or that his claim is without right, or that he has not any estate, title, interest or right to the possession of said premises. The appellant then founds his claim to the premises by virtue of a certain location made on the first day of January, 1883, by the name of the Kinna lode, the premises being then vacant mineral lands of the United States; such location having been in full compliance with the laws of congress and Montana territory by one — Wolfe.

That on the — day of January, 1883, the appellant purchased the premises from Wolfe, and ever since the first day of January,

1883, the appellant and his predecessors in interest have been the owners, held possession, and duly represented said Kinna lode, and ever since said time this defendant has been, and now is entitled to the possession of the same. That whatever claim the respondent ever had, if any, to said premises, was forfeited prior to the first of January, 1883.

The reply denied all the affirmative allegations set forth in the answer.

Upon the trial the court instructed the jury as follows: "If you believe from the evidence in the case, that prior to the thirty-first day of December, A. D. 1882, the plaintiff was in the quiet and undisputed possession of the premises designated in the complaint as the Garfield lode,—the validity of the original location of which is not questioned in the pleadings or testimony,—claimed by the defendant as the Kinna lode; that the boundaries of said claim were so marked upon the surface as to be readily traced; and that theretofore there had been discovered within said boundaries, a vein or lode of quartz, or other rock in place, bearing gold, silver or other precious metals, then this constitutes a *prima facie* case for the plaintiff, which can only be overcome by the defendant by proof of subsequent abandonment or forfeiture, or other divestiture, and the acquisition of a better right or title by the defendant."

The above statement of the pleadings shows that the respondent claimed its right to a decree that the title and right to the possession of the premises be adjudged to be in it upon the allegations of ownership, possession and right of possession thereto, and that these allegations are denied by the answer.

The allegation of forfeiture in the answer is consistent with these denials.

The respondent does not claim the premises by virtue of a patent from the United States, but by virtue of a location made by its predecessors in interest. Now, although the courts of this territory, in determining the title to mining claims where there is a dispute in relation thereto in the land office, have adopted the forms of action by which title to land is tried, which may be either by the action of ejectment or to quiet title. Yet the real question to be determined is, who is entitled to the patent from the United States government, to the mining claim in controversy; or, in other words, who has become the purchaser of the mining claim and divested the title of the government thereto by complying with the requirements of the law of congress relative to acquiring title to mineral lands. The right to the possession of a mining claim comes only from a valid location, consequently, if there is no location there can be no possession under it. Location does not necessarily follow from possession but possession from location. A location is not made by taking possession alone, but by marking on the ground, recording and doing whatever else is required for that purpose by the acts of congress and the local laws and regulations: Belk v. Meagher, 104 U. S., 279.

Therefore, when the respondent's claim of ownership and right to the possession were put in issue by the answer, it devolved upon the respondent to show affirmatively upon the trial that it had complied fully with all the requirements of the act of congress, and the local rules and regulations relative to the location of mining claims, that is, that it had made a valid location.

The above instruction, and others of the same tenor, took away from the jury the question of the validity of the original location made by the predecessors in interest of the respondent, and, so far as the pleadings were concerned, were clearly erroneous. The answer did properly put in issue the validity of the respondent's location.

Were these instructions prejudicial to the appellant? The record shows that the appellant did not introduce any evidence whatever, tending to invalidate the respondent's location. The only evidence introduced by the appellant affecting the respondent's title was simply relative to the question of forfeiture. The uncontradicted evidence introduced by the respondent upon the trial relative to the location was as follows: "That the boundaries of said claim were clearly marked upon the surface by stakes set at the corners thereof and elsewhere on said boundaries, and that said boundaries could be readily traced; that there was discovered thereon a lode of quartz rock in place bearing gold and silver, such vein having at least one well defined wall."

As to the question of citizenship: The oath attached to the certified copy of the location notice of the Garfield lode by one of the locators, states, that "he and his co-locator are citizens of the United States over the age of twenty-one years."

There is nothing in the record indicating that the locators and predecessors in interest of the respondent were not citizens of the United States, or had not declared their intention to become such. And, being natural persons, they will be presumed to be citizens of the United States until the contrary appears.

In Cox v. Gulick, 5 Halst., N. Y., referred to in Phillips on Ev., vol. 1, page 556, Ford, J., held in substance, that every man is presumed to be a citizen till the contrary be shown.

In People ex rel. Smith v. Pease, 27 N. Y., 45, which was an action in the nature of *quo warranto* to try title to an office, Davies, J., says: "So was that part of the charge correct in relation to the witness Rivinot, who testified that he was born in France and had voted, and there was no evidence tending to show that he had ever been naturalized. The judge in that case charged that the legal presumption was that he had been naturalized. No suggestion was made or evidence given when the witness was on the stand, that he had not been naturalized. He had voted, and the presumption was that he had voted legally. It was not for the court to say, as matter of law, that the vote was illegal."

The citizenship of the respondent is established by the fact, that it is a corporation formed under the laws of the state of New York.

We think that the presumption that the locators and predecessors in interest of the respondent were citizens, will protect its title to the property, until it is affirmatively made to appear that they were not citizens, or had not declared their intention to become such.

The recorded notice of location was in our opinion sufficient. The statutes of the United States require that this record should contain three things, which are requisite to its validity, viz.: "The name or names of the locators, the date of the location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim."

It is admitted by the appellant that this record does contain the first two requisites; and it is only claimed that it is defective in that it does not refer to some natural object, or permanent monument, which will identify the claim. It describes the location by metes and bounds as commencing at discovery stake, running fifty feet east to center stake; then three hundred feet north to stake "A;" thence fifteen hundred feet west to stake "B;" thence six hundred feet south to stake "C," and fifteen hundred feet east to stake "D," and three hundred feet north to place of commencement."

It then states that "this lode is located about fifteen hundred feet south of 'Vaughn's Little Jennie mine,' described and located on the fourth of July, 1880."

There was no objection made that the notice of location of the Garfield lode was not filed within twenty days from the discovery thereof, as required by the local law. There was nothing in the evidence indicating that the Little Jennie mine was not a well-known valid location at the time of the location of the Garfield lode. It will be presumed to be a well-known natural object or permanent monument until the contrary appears. Where a location is described by metes and bounds as in this notice, and is further described by being fifteen hundred feet south from a well-known quartz location, and there is nothing in the evidence to contradict such description, distance and direction, we think the ground claimed to be sufficiently identified to meet the above requirements of the act of congress. Besides, we have already said in substance that we cannot by merely looking at the notice itself, say, without evidence to the contrary, that the claim is not properly identified.

Wade, C. J., in Russell v. Chumasero, 4 Mont., 309. No objection having been made that the notice of location of the Garfield lode was not filed within twenty days after the discovery thereof as required by the local law, such objection, if any, was waived. As will be seen hereafter, the certified copy of the declaratory statement or notice of location under oath of the Garfield lode was properly admitted in evidence. Every requisite, therefore, to a valid location of the Garfield lode was established by the respondent.

No evidence was introduced by the appellant tending to invalidate the respondent's location. The only evidence offered by him was in relation to the question of forfeiture, which was upon the ground that the amount of work required by law was not done for the year

1882. The respondent's location was not questioned, and forfeiture was the only issue made upon the trial.

The instruction complained of was, therefore, not prejudicial to the appellant. The plea of forfeiture was properly made by the appellant in his answer. And this being the only issue made upon the trial, the following instruction by the court below was correct except as to the pleadings, which, as we have said before, was not prejudicial.

"The right of the defendant to recover in this case depends upon the forfeiture, which he alleges took place, of plaintiff's right to the premises by reason of the failure of plaintiff to expend in labor or improvements upon the said Garfield lode the sum of one hundred dollars during the year 1882. The plaintiff being in possession under a location, the validity of which is not questioned, it became the duty of defendant to prove by a clear preponderance of testimony that there was a forfeiture, and unless they have so proved the same to your satisfaction, your verdict should be for the plaintiff."

The appellant claims that the court erred in refusing to grant a new trial on the ground of newly discovered evidence, which was that the witness McDonald, who testified to having done the work constituting the representation of the Garfield lode for 1882, had stated out of court and before the trial, in the presence and hearing of two witnesses, "that he did not perform but two days work on said Garfield mine for 1882."

This newly discovered evidence could only affect the credibility of the witness McDonald, contradicting the affidavit of the two witnesses, and asserting that he never made any such statement.

This newly discovered testimony is cumulative. The record shows that the witnesses Orth and Arnold, called by the appellant, testified upon the trial to substantially the same thing as is stated in the affidavits relating to the newly discovered evidence.

It is by no means clear that the newly discovered evidence would have changed the result of the trial.

In Levitsky v. Johnson, 35 Cal., 41, it is said: "A party is presumed to know when he is ready for trial upon the main essential issues involved, and he cannot be allowed a new trial after having submitted his case upon such testimony as he thought proper to introduce in support of those issues of fact, by a showing that he had subsequently discovered additional pertinent evidence upon the same issue, unless it is clear that such evidence would have changed the result, and that the strictest diligence would not have enabled him to procure the same on the trial."

The granting of a new trial rests in the sound discretion of the court, and in refusing a new trial, under the above circumstances, we do not think the court abused its discretion: Caruthers *et al.* v. Pemberton *et al.*, 1 Mont., 111.

It is claimed that the court erred in admitting certified copies of the certificate of incorporation of the respondent, of the declaratory

statement under oath of the locators of the Garfield lode, and of the deeds showing title from them and the other predecessors in interest to the respondent.

In the case of McKinstry v. Clark & Cameron, 4 Mont., 370, a question arose as to the admissibility of a certified copy of a declaratory statement; and, in the opinion of the court, it was said: "The law requires the discoverer to make and file, in the office of the recorder, his declaratory statement to be by him recorded." And section 384, article 4, fifth division of the general laws, is as follows, to wit: "Copies of all papers filed in the office of the recorder of deeds, and transcripts from the books of record kept therein, certified by him under the seal of his office, shall be *prima facie* evidence in all cases."

And section 609, civil code: "There can be no evidence of the contents of a writing other than the writing itself, except in the following cases. * * *:

"Paragraph 4.—When the original has been recorded, and a certified copy is made evidence by this code or other statute."

And, in further explanation, the second clause of the fifth subdivision provides that in the cases mentioned in subdivisions 3 and 4, a copy of the original, or a certified copy, must be produced.

Taking all these statutes together, the correct conclusion is, that either the one or the other is competent evidence to offer; and it was not error in the court below to admit the certified copy of location notice in evidence without first accounting for the original. The foregoing is also conclusive as to the second specification of error. By reference to the above case, it will be seen that the second specification of error was: "Admitting certified copy of deed from Ford to Cameron."

The certified copy of the deed was also, therefore, properly admitted. The above language is also applicable to the certified copies of the certificate of respondent's incorporation. It is objected that the court erred in refusing the appellant to ask of a witness the following question:

"From the examination you made of the discovery shaft in 1881, and in June, July and August, 1882, are you able to state whether you would have known it, if any work had been done in said shaft?"

The answer to this question would simply have been an opinion by the witness as to whether or not work had been done in the shaft in June, 1882. The witness does not appear to have been a mining expert; and it was only competent to show by him the facts, such as the condition and appearance of the shaft at the respective times stated; and it was for the jury to determine from such facts, whether or not work had been done.

The only other objection insisted upon is, that the respondent had not filed in the proper office its certificate of incorporation. This question was considered by this court in the case of King v. National M. and Exp. Co., 4 Mont. 1, where it was determined that, under sections 46 and 47, p. 419, of codified statutes: "That foreign corpo-

rations are * * * not prohibited from doing business in this territory." We are satisfied with that decision, and it is an answer to the above objection.

We see no error in this record that is prejudicial to the appellant.

Judgment affirmed.

SUPREME COURT OF NEVADA.

STATE, EX REL. ATTORNEY GENERAL *v.* LAUGHTON.

Filed October 23, 1885.

EX OFFICIO OFFICER—MERGER OF OFFICES.—Making a person an *ex officio* officer, by virtue of his holding another office, does not merge the two offices into one.

LIEUTENANT GOVERNOR—EX OFFICIO STATE LIBRARIAN—FAILURE TO GIVE BOND.—The failure of the lieutenant governor to give the bond required by statute, as *ex officio* state librarian, does not create a vacancy in the office of lieutenant governor,

THE SAME—LEGISLATURE COULD MAKE LIEUTENANT GOVERNOR EX OFFICIO STATE LIBRARIAN.—There is nothing in the constitution of Nevada, prohibiting the same person from holding the office of lieutenant governor, and the office of state librarian. Such being the case, the legislature had power to create the last named office, and make the lieutenant governor *ex officio* state librarian and to impose reasonable conditions precedent to the holding of the legislative office. It had power to require the giving of a bond to secure a faithful discharge of the duties of that office, and to provide that such bond should be kept good, and in case of failure so to do, that the office should become vacant.

THE SAME—BOND OF STATE LIBRARIAN—SURETIES ON, HOW RELEASED.—The act of February 17, 1883, making the lieutentant governor *ex officio* state librarian, and the act of March 1, 1883, requiring the *ex officio* state librarian to give a bond, must be construed together with the provisions of the general statutes declaring under what circumstances an office shall be become vacant, providing for the release from liability of any surety, and prescribing the result of a failure to file a new or additional bond, within the time stated, after the filing by a surety of a legal statement in the office of the governor or secretary of state, and the service of a legal notice upon the officer.

THE SAME—A SURETY ON AN OFFICIAL BOND, IN ORDER TO BE RELEASED from future liability, must proceed, in substance, according to the requirements of section 2,930 of the compiled laws.

THE SAME—NOTICE AND STATEMENT FOR RELEASE OF SURETY.—Under such section, a surety desiring to be released from an official bond must file with the governor, or with the secretary of state, a statement in writing, duly subscribed by him, or some one in his behalf, setting forth the name of the office of the person for whom he is surety, the amount for which he is liable as such, and his desire to be released from further liability on account thereof; and a notice containing the objects of such statement must be served personally on the officer. *Held*, that such notice and statement need not be contained in two separate papers; that the notice need not state the time when nor the place where the statement was filed; that the statement and notice in the present case were sufficient, and that the latter was personally served on the respondent.

APPLICATION for *quo warranto*. The opinion states the facts.

R. M. Clarke, for the relator.

A. C. Ellis, for the respondent.

LEONARD, J. This is a proceeding to determine the right of respondent (1) to hold the office of lieutenant governor, and (2) to hold the office of state librarian.

At the general election for state officers in November, 1882, respondent was elected lieutenant governor. He afterwards qualified

according to law, and he entered upon the duties of said office on the first Monday in January, 1883. On the seventeenth February, 1883, an act was passed, to take effect March 2, 1883, which provides, among other things, that the lieutenant governor shall be *ex-officio* state librarian: Stats. 1883, 41. On the first March, 1883, an act was passed to take effect immediately, which provides that, "before entering upon the duties of the office (state librarian) the lieutenant-governor, as *ex officio* state librarian, shall execute an official bond in the sum of one thousand dollars, with sureties to be approved by the governor, conditioned for the faithful discharge of his duties, and delivery over to his successor, of all the books and other property belonging to the state librarian." * * * Respondent gave the required bond, with J. R. King and D. L. Bliss as sureties, each in the sum of one thousand dollars, and entered upon the discharge of the duties of state librarian.

Section 2,633 of the compiled laws provides that "every office shall become vacant upon the occurring of either of the following events before the expiration of the term of office: * * * Fifth. A refusal or neglect of the person elected or appointed, to take the oath of office, as prescribed in section twenty-two of this act; or when a bond is required by law, his refusal or neglect to give such bond within the time prescribed by law." * * *

By sections 2,929, 2,930, 2,931, it is provided that "any surety on the official bond of any state * * * officer, or on the bond or undertaking of any person, where, by a law, a bond or undertaking is required, may be released from all liability thereon, accruing from and after proper proceedings had therefor, as provided in this act."

"Any surety desiring to be released from liability on the bond of any state officer shall file with the governor or secretary of state, a statement in writing, duly subscribed by himself, or some one in his behalf, setting forth the name and office of the person for whom he is surety, the amount for which he is liable as such, and his desire to be released on account thereof. A notice containing the objects of such statement shall be served personally on the officer." * * *

"If any officer * * * shall fail within ten days from the date of a personal service * * * to file a new or additional bond or undertaking, the office or appointment of the person or officer so failing shall become vacant, and such officer or person shall forfeit his office or appointment, and the same shall be filled as in other cases of vacancy, and in manner as provided by law, and the person applying to be released from liability on such bond or undertaking, shall not be holden or liable thereon, after the date herein provided for the vacating and forfeiting of such office or appointment."

On July 31, 1885, D. L. Bliss, one of the sureties named, filed in the office of the governor and of the secretary of state the following document, in writing:

"CARSON CITY, July 31, 1885.

"Hon. Chas. E. Laughton, Carson, Nev.

"SIR: You are hereby notified that I, as surety for the sum of one thousand dollars ($1,000) upon your official bond as *ex officio* state librarian of the state of Nevada, desire to be released from further liability on account thereof, and to withdraw and be discharged from said bond. D. L. BLISS."

It is claimed by plaintiff that an exact copy of this paper was served personally on respondent, at his office in Carson, July 31, 1885. Respondent denies the service. Its validity will be considered further on. Respondent has not filed a new or additional bond.

On September 4, 1885, the governor filed in the office of secretary of state his written proclamation declaring the office of state librarian vacant.

1. There is no vacancy in the office of lieutenant governor, by reason of respondent's failure to file a new or additional bond. It is claimed and conceded by both sides that the office of lieutenant governor and the office of state librarian are separate and distinct. Making a person an *ex officio* officer, by virtue of his holding another office, does not merge the two into one: People v. Edwards, 9 Cal., 286; People v. Love, 25 Cal., 520; Lathrop v. Brittain, 30 Cal., 680; People v. Ross, 38 Cal., 76; Territory of Wyoming v. Ritter, 1 Wy., 333; Denver v. Hobart, 10 Nev., 31.

It is true, the lieutenant governor is required to give the bond, because the lieutenant governor and librarian are one person; but he gives it for the *ex officio* office, not the principal one. The sureties are not, and were not, intended to be liable for any malfeasance outside of the *ex officio* office. We cannot say in this proceeding that respondent's right to hold the office of lieutenant governor, and enjoy the emoluments thereof, depends upon a faithful discharge of the duties of state librarian, or upon his compliance with the statute concerning the bond required of him as librarian. We cannot pronounce the office of lieutenant governor vacant, unless respondent has done something, or failed to do something, which the law declares shall produce a vacancy therein.

The fault here charged is failure to give the bond required as state librarian. For that fault, if it exists, the only penalty that can follow in this proceeding is, at most, to declare that the office in which the bond is required was, by such failure, vacated and forfeited.

2. Did the office of state librarian become vacant in law by reason of a failure on the part of respondent to file a new or additional bond, within the time prescribed, after the filing by D. L. Bliss, in the office of the governor or secretary of state, of a legal statement, and after personal service of a legal notice?

There is nothing in the constitution of this state prohibiting respondent from holding the office of lieutenant governor and the office of state librarian: Crossman v. Nightingill, 1 Nev., 326. Such being the case, the legislature had power to create the last named office, and make the lieutenant governor *ex officio* state librarian. If

the legislature had the powers mentioned, it must follow that it had authority, also, to impose reasonable conditions precedent to the holding of the legislative office. It had power to require the giving of a bond to secure a faithful discharge of the duties of that office. It could provide that such bond should be kept good, and in case of failure to do so, that the office should become vacant.

When the statute of February 17, 1883, making the lieutenant governor *ex officio* state librarian, and the statute of March, 1883, requiring the lieutenant governor, as *ex officio* state librarian, to give a bond, were passed, they were general statutes declaring under what circumstances all offices should become vacant, providing for the release from liability of any surety, and prescribing the result of a failure to file a new or additional bond within the time stated, after the filing by a surety of a legal statement in the office of the governor or secretary of state, and the service of a legal notice upon the officer.

These different statutes must be construed together, and in such a manner, if possible, as to carry out the legislative intent. When the statute requiring the lieutenant governor, as *ex officio* state librarian, to give a bond, was passed, it was the law of this state that any or all of respondent's sureties might be released from liability, by doing certain things, and that a failure of respondent to file a new or additional bond would render the office of state librarian vacant. The legislature knew the law, and, with such knowledge, required the bond. In view of the then existing law, can it be said that the legislature intended to say respondent might give a bond or not, according to his caprice or whim? Were they acting a legislative farce when they provided that he should secure the state in the faithful discharge of the duties of this most important office? We have no right to think so, and in our opinion, the natural construction of the different statutes referred to, will not only relieve the legislature of a farcical intent, but it will also render operative and beneficial all the statutes touching the subject in hand.

Sections 2,633, 2,929, 2,930 and 2,931, are not repugnant to section 5 of the act of March 1, 1883. It is said to be so, because the last named law declares that the lieutenant governor shall be *ex officio* state librarian *at all events*, and permits no other person to fill the office or perform its duties; and, consequently, it is claimed that the requirement of a bond is a mere directory provision which may be disregarded with impunity by respondent, except so far as he might be amenable to the criminal laws of the state. It is true the legislature declared that the lieutenant governor should be *ex officio* state librarian, but it was also declared that, before entering upon the duties of the office, the lieutenant governor, as *ex officio* state librarian, should execute a bond. The first provision was intended to be dependent upon the last. It was not intended that the lieutenant governor should hold the *ex officio* office without giving and keeping good his bond.

Suppose the legislature had created the office of state librarian

and declared that a certain person named in the statute should hold the office, until the next general election, but had provided that he should execute an official bond, with sureties, before entering upon the duties of the office. Can it be doubted that, in such case, the person named would have been obliged to file his bond and keep it good, and that, in case of failure to do so, there would have been a vacancy, which, under section 8, of article 5, of the constitution, it would have been the governor's duty to fill? We think not; and yet it would have been as true in that case, that the person named was intended to be state librarian *at all events* as it is now that the lieutenant governor shall be.

In 1869, "an act to create the county of White Pine, and provide for its organization," was passed by the legislature. It provided, among other things, that certain named persons should be the officers of the county, until the next general election. M. W. Kales was made county treasurer. By the act itself, no bonds were required: Stat. 1869, 108. But, by the general law relating to county treasurers, each county treasurer, before entering upon the duties of his office, was required to take an official oath and give a bond. The same was true of other officers. Unquestionably, their tenure of office depended upon a compliance with the general law governing qualification, and yet, the act creating the county declared that they should be the county officers until the next general election. If the treasurer had said: "I will hold my office without taking any oath, or filing any bond, because the latest statute upon the subject declares that I shall be treasurer *at all events*, and permits no other person to fill the office or perform its duties," he would have found out his error.

The case of The People v. Sanderson, 30 Cal., 160, is cited as authority, in support of the claim that there is no vacancy in the office of state librarian, even conceding that the statement filed, and the notice, together with the service thereof upon respondent, were sufficient in law. We quote from the opinion:

"The next question is, was there a vacancy in the board of trustees of the state library to be filled at the time of the appointment of the relator by the governor? The act provides that the state library shall be under the direction and control of a board of trustees, to consist of five members, as therein provided. It next provides that the governor and the chief justice of the supreme court shall be *ex officio* members of the board. This designation is not of an individual or individuals, by name, but of certain officers who, by reason of their character as officers, are declared by the act to be members of the board. The appellant in this case could not, under the act, hold the position of trustee, except in his character of chief justice of the supreme court. As a trustee, he has no power to resign unless he resigns the office on which it depends. There can be no vacancy of the place in the board of trustees, so long as there is a chief justice, and no person other than that functionary can fill it, because the statute makes no provision for an incumbent of the place

designed to be occupied in the board by the chief justice, other than the person who may for the time be invested with the superior office. The relator cannot fill the place intended by the act to be filled by the chief justice as such, because he does not possess the official character, which is essentially a condition precedent to his capacity and power to hold the place alleged on his part to have been vacant by constitutional consequence, when he was appointed to it by the governor. The legislature, by the act, evidently intended that the board of trustees should consist of five members, and it is quite as evident that it was intended one of them should be the chief justice of the supreme court, and no other person; but as the chief justice was, at the time, and from thence hitherto has been, constitutionally incompetent to perform the duties of trustee, the act as to him, and the place to be filled by him, was and is inoperative and void. The conclusion to which we have come on this point is, that there was no place in the board of trustees to be filled, at the time the relator was appointed, as set forth in the information, and that the appointment of the relator, trustee, was without authority and void."

We cannot agree with many of the conclusions expressed above. In our opinion, under the statutes of California, similar to ours, there was a vacancy in the board, which it was the duty of the legislature, if in session, to fill; and if it was not in session, that duty devolved upon the governor.

It was decided by the court in that case, that the chief justice, by reason of his judicial position, could not, under the constitution, exercise the functions and duties of trustee of the state library. In other words, it was, in effect decided, that one of the persons or officers named in the act who should constitute the board, in part, was incompetent. The legislative appointment, as to that officer, was null. It was as though it had not been made. But that fact did not make the board consist of four instead of five. It still remained true that the board should consist of five members. Why disregard that provision of the statute, simply because, by reason of a mistaken idea of the constitution, the legislature had done a void act?

The statute of California, Wood's Digest, article 2,871, provided that, "every office shall become vacant upon the happening of either of the following events, before the expiration of the term of such office. * * * 8. The decision of a competent tribunal declaring the election or appointment void, or the office vacant." And the second section of the statute creating the board provided that, "In case of a vacancy for any cause, in the board of trustees, the legislature shall elect, on joint ballot, to fill such vacancy. If a vacancy occur when the legislature be not in session, the governor shall have power to fill such vacancy until the ensuing session of the legislature."

It seems to us that, when the supreme court, a competent tribunal, declared the appointment of the chief justice void for constitutional reasons, the board, still consisting of five members, was but four-

fifths full, and that, as to the other fifth, there was a vacancy, which could have been filled by the proper appointing power.

3. It is urged by counsel for respondent that the document filed with the governor and in the office of secretary of state, and the notice claimed to have been served personally upon respondent, were insufficient in law. It is undoubtedly true that, in order to be released from future liability, a surety must proceed, in substance, according to the requirements of section 2,930, compiled laws. Did Mr. Bliss do so in this case?

It is provided by section 2,921, compiled laws, that official bonds of all state officers, except that of the secretary of state, shall be approved by the governor, and filed in the office of secretary of state. Such were the requirements in relation to the bond in question: Stat. 1883, 102, sec. 5. Section 2,930, compiled laws, provides that sureties desiring to be released from bonds of state officers shall file with the governor who approved them, or with the secretary of state in whose custody they are kept, "a statement in writing, duly subscribed by himself, or some one in his behalf, setting forth the name and the office of the person for whom he is surety, the amount for which he is liable as such, and his desire to be released from further liability on account thereof;" and "a notice containing the objects of such statement shall be served personally on the officer." * * *

By sections 2,929, 2,930, 2,931, the legislature intended to accomplish three things: First, to enable an unwilling surety to absolve himself from future liability; second, to protect the state by giving it notice, through its proper officers, of the desire and intention of the surety to be released; and, third, to give the officer time, after receiving notice, to make good his bond, and thus escape the penalty of forfeiture. A compliance with the statute sufficiently strict to accomplish the objects intended should be required.

From the written document filed with the governor and secretary of state, it cannot be doubted that each of those officers were informed that Mr. Bliss was surety for respondent on his official bond as *ex officio* state librarian, in the sum of one thousand dollars, and that he desired to be released from further liability on account thereof. Those facts, and no others, could be gathered from the paper. It is said that the statute contemplates a statement *and* notice—two different papers, each performing a distinct office, differing in form and substance. That they *may* be different is true, but that they *must* be so is incorrect. If each contains all that is required to be put in both, neither becomes invalid because something is inserted therein which might have been left out.

A written statement is a series of facts or particulars expressed on paper. The one filed in this case is in the form of a notice addressed to respondent, but it is a statement still. It is a writing informing any one who reads it, of all the facts required by the statute to be inserted in a statement, and is sufficient to accomplish all the purposes intended. It is said that the notice should contain the substance

of the statement, and also, the time when and place where the statement was filed. This notice does contain the entire contents of the statement filed. It is a true copy of the statement. But it need not inform respondent of the time and place of filing—first, because the statute does not require it; and second, because such notification would be useless and accomplish no useful end. Any officer must be presumed to know the law. He knows that a surety who wishes to be released from his bond must file a statement in one of two places, and serve a notice upon him. When he receives the notice, he may and should seek the proper depository of the statement and there ascertain its contents, if one has been filed, and if it has not, the notice goes for nought. If it has been filed, it is his duty to proceed according to law and file a new bond. The "objects of the statement" must be inserted in the notice. In other words, the surety, by the notice, must inform the officer what induces him to take action in the premises, what he intends to accomplish. But he need not use the exact language of the statute and say, "I have filed a statement in the office of the governor, and my *object* in so doing is to be released from your bond." It is enough if he states the objects without specifying them as such. It is plain that the object of Mr. Bliss in making his statement, in all that he did, was to be released as surety. That object only is contained in the notice. We think the written notice is sufficient in form and substance.

4. But one other question remains for consideration: Was the notice served on respondent personally, on July 31, 1885? After careful examination of all the evidence introduced in the case, including surrounding circumstances, we are satisfied that it was.

It follows from the foregoing, that respondent is not entitled to hold and enjoy the office of state librarian of the state of Nevada, and as to that office, a judgment of ouster must be entered against him, with costs.

It is ordered.

SUPREME COURT OF CALIFORNIA.

No. 9,564.

HOULT ET AL. *v.* BALDWIN.

Department One. Filed October 29, 1885.

SALE OF MANUFACTURED ARTICLES—WARRANTY OF FITNESS—RESCISSION OF CONTRACT.—Plaintiffs sold to the defendant a harvesting machine of their own manufacture, and guaranteed, in writing, "that it would do good work in cutting and thrashing ordinary grain;" they also agreed to send a man with the machine, to start it, "and show to the defendant's satisfaction that it was all that they represented it to be." The machine was shipped by rail to the defendant; upon its arrival he carefully adjusted it, and commenced to haul it away, when it broke down, so that it could not be moved; he immediately notified the plaintiffs, who forwarded a duplicate of the broken part; this was adjusted, and the machine started, when it again broke down in the same manner. The defendant thereupon immediately notified the plaintiffs of his refusal to accept the machine. In an action to recover the purchase price of the machine, *held*, that under sections 1,679 and 1,770, of the civil code, as well as under the written guarantee, the plaintiffs warranted the machine to be reasonably fit for the purpose intended, and to be free from any latent defects, arising from the process of manufacture, not disclosed to the defendant; that upon a breach of such warranty the defendant was entitled to rescind the sale by returning, or offering to return, the machine, and that a refusal so to instruct the jury was error.

APPEAL from a judgment of the superior court of San Joaquin county, entered in favor of the plaintiffs, and from an order denying the defendant a new trial. The opinion states the facts.

Lloyd & Wood and *J. A. Louttit*, for the appellant.

J. C. Campbell and *W. L. Dudley*, for the respondents.

BELCHER, C. C. This in an action to recover the purchase price of a harvesting machine known as a combined header and separator.

The machine was manufactured by the plaintiffs at the city of Stockton, and is alleged to have been sold and delivered by them to the defendant in the month of May, 1878.

About the middle of April of that year the defendant was at Stockton, and in company with one H. C. Shaw, who resided there, went to the plaintiffs' shops and saw some of the machines, which were in process of construction.

After leaving the shops, defendant said to Shaw: "If I write up to you to secure one of these machines, will you attend to the business for me?" and Shaw said he would.

None of the machines were then finished, or expected to be finished for nearly a month.

The defendant then went away, and a correspondence was carried on between him and Shaw, and to some extent between him and the plaintiffs, in reference to the purchase of a machine and the terms and conditions on which one would be furnished.

On the twenty-third of April, Shaw left an order for one of the machines, and on the fifteenth of May one was finished and placed on a car to be shipped to the defendant's ranch in Los Angeles county.

When the machine arrived at the railway station nearest to the ranch, it was carefully taken from the car, and the detached parts

were put together. Animals were then harnessed to it, to haul it away, but before it had gone more than forty or fifty feet from the depot, upon a dry, hard and level road, the tiller post, by which the guiding wheel was attached to the tongue, broke, and it could be moved no further. A telegram was immediately sent to the plaintiffs, notifying them of the break, and they at once sent forward a duplicate casting to take the place of the broken one. The new casting was put in place and another effort was made to haul the machine to the ranch, but before it had gone many feet the new casting also broke.

The defendant then declined to accept the machine, and offered to return it to the plaintiffs, and to pay the return freight thereon.

This was the first machine which went out from the plaintiffs' shops during that year, and very soon after it was shipped, an improvement was introduced and used upon all the other machines by which the tiller post was strengthened. "It was made heavier; more metal was used in the plate or bottom part and a stirrup or iron strap was put around it." The plaintiffs did not offer to furnish to the defendant the improved tiller post, or notice in any way the fact that the machine had become disabled a second time. They waited four months without demanding pay for the machine, or making any suggestion about its use or return, and then commenced this action.

In defense of the action the defendant set up a warranty of the machine, a breach of the warranty, and a prompt offer to return the machine to the plaintiffs after he discovered its insufficiency.

The case was tried before a jury, and the verdict was in favor of the plaintiffs "for the full amount claimed, with interest."

The defendant—appellant here—now insists that the verdict was not justified by the evidence, and that the court erred in giving certain instructions, and refusing to give other instructions to the jury.

We think the motion for new trial should have been granted.

It appears from the testimony in the case that on the very day the machine was ordered, the defendant was notified of the fact of its being ordered, and that the plaintiffs proposed to deliver it upon the cars, and that their responsiblity, so far as the working of the machine was concerned, should then be at an end; that the defendant was unwilling to accept it on those terms, and demanded a guarantee that it would do good work; that the plaintiffs at once acceded to the demand, by executing and forwarding to the defendant a written guarantee that the machine would do good work in cutting and thrashing ordinary grain, standing from one to five feet in height.

When the defendant demanded the guarantee he added that he would be willing to pay expenses of a man to start the machine on his ranch and test the same. The plaintiffs, in reply, said: "We will send a man with the machine, you paying his expenses to your ranch and back. He will start the machine and show to your satisfaction that it is all that we have represented it to be."

The machine was sent forward, but the plaintiffs did not send a man with it, nor did they send one after they were notified that it had broken. It is claimed for the respondents, that their guarantee

was made after the sale was complete, and that it was, therefore, without consideration and void, and that, at any rate, one of the conditions of the guarantee was that the man sent by the plaintiffs should *start the machine*, and, as defendant endeavored to start it without notifying them, they are entitled to recover in this action the price of it.

This position cannot be maintained. It is clear from the testimony that the guarantee was not made after the sale was complete, and it was not without consideration and void. It is also evident that when the plaintiffs promised to send a man to start the machine, they meant to start it in the grain field, and not from the railroad depot to the ranch.

But if the respondents were right in their contention as to the written guarantee, still the civil code provides: "Section 1,679. One who sells or agrees to sell an article of his own manufacture, thereby warrants it to be free from any latent defect, not disclosed to the buyer, arising from the process of manufacture, and also that neither he nor his agent in such manufacture has knowingly used improper materials therein.

"Section 1,770. One who manufactures an article under an order for a particular purpose, warrants by the sale that it is reasonably fit for that purpose."

The warranties provided in these sections are as broad at least as the written guarantee, and must be held to have attended and been conditions of the sale.

Having taken the machine, then, under a warranty, whether it be that expressed in the writing, or provided by the code, or both, the defendant had the right, if there was a breach of the warranty, that is, if in any respect the machine was not what it was warranted to be, to rescind the sale by returning, or offering to return, it to the plaintiffs: Polhemus v. Heiman, 45 Cal., 573.

The principal questions for the jury were: Would the machine, as sent forward, do good work in cutting and thrashing ordinary grain from one to five feet in height? Was it reasonably fit for the purpose for which it was ordered? Was there any latent defect arising from the process of manufacture not disclosed to the buyer?

The theory of the plaintiffs, at the trial, was that their responsibility in respect to the machine ceased when it was placed on the cars at Stockton, and that they then became entitled to demand and receive the agreed price for it.

This theory finds expression in instruction No. 1, given at the request of the plaintiffs, and in the modification of instruction No. 4, given at the request of the defendant. This theory, as we have seen, was wrong, and the court erred in giving the plaintiffs' instruction, and in refusing to give without modification that of defendant.

The court also erred, we think, in striking off a part of instruction No. 1, and in refusing to give instructions Nos. 9 and 10, asked by defendant.

As the case must be tried again and be somewhat differently presented, we do not deem it necessary to speak particularly of the other instructions given and refused.

The judgment and order should be reversed and the cause remanded for a new trial.

SEARLS, C., and FOOTE, C., concurred.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are reversed and the cause remanded for a new trial.

No. 9,988.

RODGERS, ADM'X *v.* CENTRAL PACIFIC RAILROAD COMPANY.

Department One. Filed October 29, 1885.

NEGLIGENCE—RAILROAD—LIABILITY OF EMPLOYER—ORDINARY CARE—ACT OF GOD.—A railroad company is bound to furnish to its employees a suitable and safe road, engines, cars and appliances for conducting its business, and to select competent and reliable servants, the nature of the business being considered. This duty performed, if from some extraordinary extrinsic cause or condition, such as an act of God, an injury results to the employee, the company is not liable. If, however, the injury results from the combined operation of the act of God and the want of ordinary care on the part of the company, the employer is liable, under section 1,971 of the civil code. But not if the company was only guilty of slight negligence.

A JURY CANNOT RECEIVE EVIDENCE OUT OF COURT.

APPEAL from an order of the superior court of Sacramento county, granting the defendant a new trial. The opinion states the facts.

W. B. Treadwell, for the appellant.

S. C. Denson, for the respondent.

SEARLS, C. This is an action to recover damages for the death of plaintiff's son, claimed to have been caused by the negligence of the corporation defendant. Plaintiff had verdict, which was set aside by the court below, and a new trial granted. Plaintiff appeals from the order granting a new trial.

James McGregor Rodgers, the intestate of plaintiff, who was a servant of defendant and fireman on one of its locomotive engines, was killed in a train accident at China Gulch in Shasta county.

An important question at the trial was, whether defendant was guilty of negligence in the construction and maintenance of a bridge across said gulch, by the fall of which the train in question was precipitated into a chasm and decedent killed, or whether the accident was due to an enormous downflow of water, caused by what is familiarly known as a cloud-burst, and constituting what is designated as an "act of God."

The court below very properly instructed the jury, in effect, that if the accident was attributable to a "superhuman or irresistible cause" to an "act of God," the defendant would not be liable—that, as a general principle, no man shall be responsible for that which

no man can control, and then proceeded in his instruction as follows:

"But if, in addition to the act of God, so-called, the intervention of man takes place, co-operating with it and commingling with it to any extent, however slight, and an injury then results, the injury is to be ascribed not to the act of God—which would constitute no defense in the case supposed—but to the act of man; and, therefore, if the negligence of a human being concurs with the act of God and causes an injury, the party thus negligent would be responsible therefor."

The objection taken to this instruction on the motion for new trial was that it did not discriminate between the different degrees of negligence—that it gave the jury to understand that if the act of the defendant, *in the slightest degree*, concurred with the act of God in producing the injury complained of, the defendant would be liable without regard to whether the negligence proven on its part, was *slight, ordinary or gross.*

The court below was of opinion defendant was only liable to its employee for want of ordinary care, and not for slight negligence, and, therefore, that the instruction tended to mislead the jury, and was erroneous.

"Where an employment is accompanied with risks of which those who enter into it have notice, they cannot, if they are injured by exposure to such risks, recover compensation from their employer:" Wharton on Negligence, sec. 200.

Where, however, an employment involves special risks known to the employer, but of which the servant is not cognizant, and which are not patent, it is the duty of the employer to acquaint the servant therewith, and, failing to do so, he will be liable for injury from such risks, suffered by the employee: Baxter v. Roberts, 44 Cal., 188.

Manifestly, it was the duty of the defendant, a railroad company, to furnish alike to its passengers and employees a suitable and safe road, engines, cars and appliances for conducting its business, to select competent and reliable servants, the nature of the business considered. This duty performed, and if from some extraordinary cause or condition, extrinsic to defendant's action, an injury results, defendant is not liable.

Responsibility ceases where accident intervenes.

If there is nothing to be imputed to a defendant, there is nothing with which he is chargeable.

If, however, the negligence of a defendant has combined with the act of God, with inevitable accident in producing the injury complained of, he is liable.

The question presented here is as to the degree of negligence which, thus combining with a *superhuman or irresistible cause*, will render a defendant liable.

According to the instruction given by the court below, if the act of the defendant co-operated and commingled *to any extent however slight*, with the accident, defendant would be liable.

We do not think this is, or should be, the rule as to the liability of a defendant, engaged in a lawful pursuit, to his employee.

"Where a man engaged in a lawful business, exercises reasonable care, the law does not make him an insurer of others against those consequences of his actions which reasonable care and foresight could not have prevented. The law justly ascribes such consequences to inevitable misfortune, or to the act of God, and leaves the harm resulting from them to be borne by him upon whom it falls. The contrary rule would obviously be against public policy, because it would impose so great a restraint upon freedom of action as materially to check human enterprise:" Thompson on Negligence, 1,234-5; see also Brown v. Kendall, 6 Cushing, 292; Morris v. Platt, 32 Conn., 75.

The civil code of this state, section 1,971, is as follows:

"An employer must in all cases indemnify his employee, for losses occasioned by the former's want of ordinary care."

The code having thus established the rule by which to ascertain the liability of the employer to his employee, it is not within the province of the courts to depart from it.

The instruction as given was violative of the rule, and the new trial was properly granted.

2. So, too, we think the acts of the jury in receiving evidence out of court were improper.

Other errors were assigned as grounds for the motion, but as the action of the court in awarding the new trial was based upon the points herein noticed, we do not deem further discussion necessary.

We are of opinion the order appealed from should be affirmed.

BELCHER, C. C., and FOOTE, C., concurred.

BY THE COURT. For the reasons given in the foregoing opinion the order is affirmed.

No. 9,802.

TAYLOR ET AL. *v.* CENTRAL PACIFIC RAILROAD CO. ET AL.

Department One. Filed October 29, 1885.

FINDINGS—EVIDENCE REVIEWED.—In an action to compel the assignment and for the specific performance of a contract for the sale of land, the findings reviewed and held supported by the evidence.

WHERE THERE IS A SUBSTANTIAL CONFLICT in the evidence, the findings will not be disturbed.

FINDINGS ON FACTS ADMITTED BY THE PLEADINGS are not necessary.

DECLARATIONS OF VENDOR—EVIDENCE—ACTION FOR ASSIGNMENT OF CONTRACT.—In an action against a subsequent purchaser, to compel him to assign a contract for the sale of land, declarations of the vendor, made without the knowledge of, and not in the presence of, the defendant, are not admissible against him.

THE SAME—BONA FIDE PURCHASER—EVIDENCE OF WANT OF NOTICE.—In such action, where notice by the defendant of the plaintiff's equities is one of the questions at issue, the defendant may testify that at the time he purchased the land he had no knowledge that any portion of it was inclosed by the plaintiff.

THE SAME—POSSESSION OF LAND, WHEN NOTICE.—Possession of land, in order to impart notice of the rights and equities of the holder, must be actual, open, exclusive, notorious and visible.

THE SAME—CASE IN JUDGMENT.—The defendant railroad company contracted to sell the land in dispute to the defendant Davis. In an action by the plaintiff to compel the assignment of such contract, the company made default; the defendant Davis answered, and findings and judgment were rendered in his favor. *Held*, that the company was in the attitude of a trustee, holding the legal title for him, and if the plaintiff was not entitled to relief as against him, she was not entitled to enforce a deed from the company.

APPEAL from a judgment of the superior court of Tehama county, entered in favor of the defendant, and from an order denying the plaintiffs a new trial. The opinion states the facts.

John F. Ellison, for the appellants.

J. S. Matlock, Clay W. Taylor and *Creed Haymond*, for the respondents.

SEARLS, C. This is an action to compel Charles Davis, one of the defendants, to assign to plaintiffs a contract for the purchase of certain railroad lands, entered into by the Central Pacific Railroad Company with said Davis, and to require said Central Pacific Railroad Company to convey said lands to plaintiffs upon making full payment therefor. The cause was tried by the court, without a jury, and upon the findings a judgment for costs was rendered in favor of defendant Davis. From this judgment, and from an order denying a new trial, plaintiffs appeal.

Objection is taken to a portion of the fourth finding of the court, which is as follows:

"That heretofore, and prior to June 25, 1883, said defendant, the Central Pacific Railroad Company, issued and had distributed a circular by which it invited people to settle upon and improve its lands, and promised that should they do so the persons so settling and improving said lands, *and who should file applications therefor*, should be preferred purchasers for said lands when they were offered for sale by said company."

The objection is aimed at the words in italics, which, it is claimed, are not warranted by the evidence. The contention of appellants is that in the circular of the railroad company, which is the only evidence on the subject, it nowhere appears that those "who filed applications" should be preferred purchasers.

The circular in question, which is too long for insertion here, commencing a page twenty-seven of the transcript, provides that "all persons who desire to purchase lands from the railroad company should make application to the land agent at the land office of the company in San Francisco, California, either personally or by letter, describing the lands by section, etc. * * * This application will be filed, and the land will not be sold without giving the applicant thirty days previous notice. An application for land confers no right or privilege on the applicant. It is merely a notice that he wishes to buy. The first application is not given precedence. * * * Settlers and actual occupants, who in good faith cultivate and improve lands belonging to the company, will generally be given preference of purchase at the regular price, and they are invited to settle upon and improve the vacant lands, whether they

are applied for or not by other persons. * * * Applications to purchase lands can be filed in the land office of the company at any time after survey by the government, but no application will be acted upon until three months after * * * plats shall have been filed. * * * Blank applications will be furnished. * * * In filling in blanks it is requested that, etc."

From the foregoing extracts, it would appear that the railroad company was desirous of selling its lands; that it invited actual settlers and informed them that generally such settlers would be given a preference. It also invited applications for purchase; announced that they would file them, that blanks would be furnished; gave instructions as to the mode of filing them. It specified that an application would confer no right or privilege on the applicant.

From these and other clauses in the circular, we draw these conclusions:

First—The company did not desire to fix an iron-clad set of rules, applicable to all cases, without exception.

Second—That its mode of selling was through applications to purchase filed in its land office.

Third—That to actual settlers on its lands, who were such applicants for purchase, a preference would usually be given, whether they were the first applicants or not.

Fourth—The proviso that an application to purchase conferred no right, and that the first application is not given precedence over those which may be filed later, were inserted, the better to enable the company to carry out its object of giving a preference to actual settlers.

If the contention of the appellant can be supported, and an actual settler upon railroad lands could hold without an application to purchase, then, under the rules, he need never apply to purchase. His possession and improvements would constitute a bar to the purchase by others, and he might continue to hold forever, or at least until some new rule was formulated. It is usually understood that two parties are essential to every contract of sale, a seller and a buyer; that their wishes and intentions must concur to effect such sale.

In the present case, the evidence of such concurrence on the part of the purchaser, is to be found in his application to purchase.

We are of opinion, therefore, that the finding of the court below was amply supported by the evidence, and that any other deduction, not in consonance therewith, would have been unwarranted.

The fifth finding is to the effect that said plaintiff failed and neglected to accept and comply with the terms offered by the company; that she never filed or offered to file any application for the land; that she never entered upon or cultivated or put valuable improvements upon the land, save and except that about twenty acres of said tract was within the inclosure of plaintiff, which inclosed other and adjoining land owned by her, and that of the twenty acres thus inclosed, some twelve acres were planted in alfalfa.

So far as the objection to this finding is based upon the same theory as that advanced against No. 4, nothing in addition need be said, except that the evidence as to whether plaintiff ever at any time made an application to purchase the land was conflicting.

There was testimony tending to show that no application whatever was on file at the land office, and that up to the time of the sale of the land the railroad company never knew the plaintiff, M. J. Taylor, as an applicant to purchase.

According to her own testimony, as given on cross-examination, she went to San Francisco and saw B. B. Redding, who was the land agent of the company, and "nothing further took place between us, except a verbal conversation. I did not make out an application for the land at that time."

It is to be inferred from the testimony, that at the time the land comprised a town site, and was not, therefore, for sale.

There is also a substantial conflict in the testimony as to whether plaintiffs ever occupied or improved any of the land in question, except the twenty acres, and as to that quantity, it may well be doubted if it was not occupied by reason of a mistake as to the whereabouts of the subdivision lines of the government survey.

The findings and each of them seem to us to be supported by evidence, and a diligent examination fails to show any sufficient cause for pronouncing them in conflict therewith. It was not necessary for the court to find upon the allegation of the complaint, that plaintiff was not notified of the time and place of the sale, for the reason that no issue is made in reference to that question. It is an admitted fact under the pleadings.

Plaintiff complains that there is no finding upon the tenth allegation of her complaint, that defendant Davis never occupied the land, or any part thereof, and never improved the same, and that she had been in the exclusive possession for more than two years. The answer is to be found in the fifth finding and in the thirteenth, both of which are supported by evidence.

The errors of law relate:

First—To the refusal of the court to permit J. J. Stewart, a witness for plaintiffs, to state what was said to him in reference to a sale of this land, by the officers of the railroad company, when he visited San Francisco with a view of purchasing it.

We cannot see that the declarations were admissible, for the reasons:

1st—That it does not appear from the offer of plaintiff, when they were made, whether before or after the contract for purchase by defendant.

2nd—Defendant is not shown to have been present, or to have had any knowledge of such declarations, without which they could not bind him.

Second—To the action of the court in permitting defendant, under objection, to testify that at the time he purchased the land in

question he had no knowledge that any portion of it was within the inclosure of plaintiff.

The question of notice to defendant was one of the mooted points in the case, and it was entirely competent for him as a witness to state his information on the subject.

Third—To a like ruling upon the objection of plaintiff to testimony of defendant, that at the time he contracted to purchase the land he did not know, and had never heard of, any application by plaintiff to purchase the same. The testimony was material, under the issues made by the pleadings. The theory that plaintiff was in possession of the land, and that such possession was notice of her rights and equities, and, therefore, that it was incompetent to prove that defendant knew nothing of her possession, cannot be sustained.

Possession, in order to impart notice of the rights and equities of the holder, must be actual, open, exclusive, notorious and visible: Smith v. Yule, 31 Cal., 180; Pell v. McElroy, 36 Cal., 268; O'Rourke v. O'Connor, 39 Cal., 442; Polack v. McGrath, 22 Cal., 15. The possession of plaintiff was denied, and, except the portion inclosed with her adjoining land, the court very properly, as we think, found against her claim. She had not settled upon nor improved the land in any proper sense.

The case as made is essentially different from that of Boyd v. Bricken, 55 Cal., 427.

The alleged error of the court in rendering judgment in favor of the defendant, the Central Pacific Railroad Company, is not supported by the record.

This defendant having failed to answer, its default was entered, and, as far as appears, no action was afterward taken in reference to it, except that in the conclusions of law it is found that plaintiff is not entitled to a judgment compelling the defendant, Charles R. Davis, to assign his contract for the purchase of the land to said plaintiff, and compelling said railroad company to convey said land to her.

The railroad company having contracted to sell the land to the defendant, Davis, was in the attitude of a trustee, holding the legal title for him, and if the plaintiff was not entitled to relief as against him, she was not in a position to enforce a deed from his trustee.

The judgment was for the defendant, Charles R. Davis, for costs of suit.

We are of opinion the judgment and order appealed from should be affirmed.

FOOTE, C., and BELCHER, C. C., concurred.

BY THE COURT. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

No. 9,867.

PEOPLE, ETC., v. PITTSBURG RAILROAD COMPANY.

In Bank. Filed October 30, 1885.

SUPPLEMENTAL TAX ROLL—ASSESSMENT VOID, IF NO OPPORTUNITY IS GIVEN TO CONTEST AMOUNT.—Section 9, of the act of April 18, 1874, which attempts to provide for an assessment by the assessor of the city and county of San Francisco, which is arbitrary and absolute, without the possibility of equalization by the board of supervisors, as it provides for assessment to be made after the time within which the board can act, is violative both of the constitution of the state and of the fourteenth amendment of the constitution of the United States, in that it deprives the person assessed of an opportunity to appear before the board for the purpose of contesting the amount assessed against him.

THE SAME—FAILURE TO FURNISH STATEMENT DOES NOT VALIDATE ASSESSMENT.—An assessment so made is invalid, although the person assessed failed to furnish the assessor with a list of his taxable property, as provided for by section 3,629 of the political code.

APPEAL from a judgment and order of the superior court of the city and county of San Francisco, entered in favor of the plaintiff. The opinion states the facts.

W. T. Baggett, for the plaintiff-appellant.

John B. Harmon, for the defendant-appellant.

MCKINSTRY, J. The action is to recover city and county and state taxes for the fiscal year 1880–1, as entered upon the "supplemental tax roll" under the act of April 18, 1874: Stats. 1873-4, p. 477. The assessment was made after the board of equalization had finally adjourned, and under the ninth section of the act above cited.

The constitution of the state contemplates: First, assessment by the assessor; second, action by the county board of equalization; third, action by the state board of equalization. Under section 9 of article xiii., the taxpayer is entitled to notice of the meetings of the county board at which his taxes may be increased. But the ninth section of the act of 1874 attempts to provide for an assessment by the assessor, of the city and county of San Francisco, which is arbitrary and absolute, without the possibility of equalization by the board of supervisors, as it provides for assessment to be made after the time within which the board can act. The legislature has no power thus to deprive the citizen of an opportunity of appearing before the board for the purpose of contesting the amount assessed against him. The ninth section is violative, both of the constitution of the state and of the fourteenth amendment of the constitution of the United States.

It is urged that defendant cannot rely upon the invalidity of the statute, because he failed to furnish the assessor with a list of his taxable property. The political code makes it the duty of the assessor "to exact" from each person a statement, under oath, setting forth specifically all his real and personal property, etc.: Section 3,629. And section 3,633 provides:

"If any person, after demand made by the assessor, neglects or refuses to give, under oath, the statement herein provided for, or to comply with the other requirements of this title, the assessor must note the refusal on the assessment book, opposite his name, and must

make an estimate of the value of the property of such person; and the value so fixed by the assessor must not be reduced by the board of supervisors."

There is no finding in the transcript that the assessor demanded or attempted to exact from defendant the statement mentioned in section 3,629, or that defendant neglected or refused to give, under oath, the statement "after demand made by the assessor."

Moreover, the statute provides the penalties for a failure to furnish the statement after demand made by the assessor. First, the person refusing to make the statement is liable to pay one hundred dollars: Political code, 3,682. Second, he is deprived of the right to have reduced the valuation placed upon his property by the assessor, prior to the adjournment of the county board of equalization: Political code, 3,633. That such is the meaning of section 3,633 is apparent from the language therein employed. The last clause declares "the value so fixed by the assessor must not be reduced by the board of supervisors," and clearly indicates the valuation referred must be made before the adjournment of the board as a board of equalization.

We are not authorized to add any third consequence as resulting from the failure to furnish a list of property, even where a list or statement has been demanded by the assessor, *a fortiori*, under the pretense of imposing a third and distinct penalty upon a failure to furnish the statement of property, to vitalize and render operative a provision of the statute clearly violative of the constitution.

Neither City and County of San Francisco v. Flood, 1 West Coast Rep., 567, nor Orena v. Sherman, 9 Pacific Coast Law Journal, 814, is in conflict with the views above expressed. In both the assessment was made by the assessor prior to the meeting of the county board of equalization. In Orena v. Sherman, it appeared that the assessor had entered in his assessment book that the party assessed had refused to furnish a statement of his property, and thereby declared and determined that demand had been made and the list refused.

Judgment reversed.

MCKEE, J., MORRISON, C. J., SHARPSTEIN, J., and ROSS, J., concurred.

MYRICK, J., and THORNTON, J., dissented.

No. 9,846.

PEOPLE, EX REL. LEVERSON v. THOMPSON, SECRETARY, ETC.

In Bank. Filed October 30, 1885.

CONGRESSMEN WERE NOT VOTED FOR UNDER THE ACT OF 1872, AT THE ELECTION OF NOVEMBER 4, 1884.—Conceding that the act of March 13, 1883, entitled, "an act to divide the state of California into congressional districts," was invalid, because of non-compliance by the legislature with certain formalities required by the constitution, still, the petitioners are not entitled to a mandate directing the secretary of state to certify to the governor that two of them were duly elected congressmen-at-large, and that each of the others was elected a member of the house of representatives, in a congressional district created by the act of March 30, 1872, because the electors throughout the state did not vote for two members of congress-at-large, nor did the electors within the limits of each of the congressional districts, as prescribed by the act of 1872, vote for a member of congress to represent the people of such district.

THE SAME—ELECTION—NOTICE BY PROCLAMATION WHEN NECESSARY—VOTING FOR CANDIDATE WHEN NOT AN ELECTION.—Notice, by proclamation, of an election, is necessary whenever the voters are not bound, by law, to take notice of the time of the election, and of the officers then to be chosen. And, conceding that when a term of office is to expire at a certain date after a general election, the electors take notice the office is to be filled at such general election, still, where a vacancy has occurred by reason of death or resignation, the voters are not bound to take notice of such vacancy, and the casting of votes for a candidate to fill the vacancy does not constitute an election.

THE SAME—ELECTORS NOT BOUND TO KNOW THAT ACT OF 1883 WAS INVALID.—The electors throughout the state were not bound to know, under penalty of disfranchisement, that the statute of 1883, regular in form, certified to have been properly passed by the appropriate officers, published as other statutes are published, approved by the governor, and by him acted upon when he issued his proclamation for a general election, held on November 4, 1884, was void because of matters not appearing on the face of the statute, but which could be ascertained only by an examination of the journal of the two houses of the legislature; or that the law of 1872 was still in full force and operation.

THIS is an application for a writ of mandate, compelling the secretary of state to compare and certify the votes cast at the last congressional election, in accordance with the law in force in this state prior to the thirteenth day of March, 1883.

It is claimed by petitioner that at the election for representatives in congress, held on the fourth day of November, 1884, there were to be elected four representatives, under the act of March 30, 1872, entitled "An act to divide the state of California into congressional districts," and two representatives at large, under an act of congress entitled "An act making apportionment of representatives in congress among the several states, under the tenth census," approved February, 1882, and that the votes cast at such election should be compared and estimated in accordance with said acts. In order to sustain this claim, the act of the legislature of March 13, 1883, entitled "An act to divide the state of California into congressional districts, under which said election was held, and the votes cast thereat compared and estimated, is sought to be declared null and void. This act is attacked, not as to its matter, but as to the mode of its passage, and the journals of the legislature are resorted to in order to sustain this attack.

Petitioner claims that this act was not passed in accordance with section 15, article iv., of the constitution, requiring that every bill shall be read on three several days in each house, because the amendments made to the bill during its passage were not read on three several days in each house, and further, because the bill, with the amendments thereto, was not printed for the use of the members

on its final passage, and he produces the journals and other testimony to sustain this point.

E. C. Marshall, attorney general, M. R. Leverson and *George W. Chamberlain*, for the petitioner.

Horace G. Platt, amicus curiæ, for the respondent.

MCKINSTRY, J. The petitioners are not entitled to a mandate directing the secretary of state to certify to the governor that two of them were duly elected congressmen at large, and that each of the others was elected a member of the house of representatives, in a congressional district created by the act of the legislature of 1872.

If it should be conceded that the act of 1883 is invalid, because of non-compliance by the legislature with certain formalities required by the constitution, yet, as appears from the petition and facts, of which we take judicial notice, the electors throughout the state did not vote for two members of congress at large, nor did the electors within the limits of each of the congressional districts, as prescribed by the act of 1872, vote for a member of congress to represent the people of such district.

Notice to the electors lies at the foundation of any popular system of government. It has sometimes been held that the existence of a law fixing the time of an election, and the offices to be filed, is of itself notice. It may be conceded that when a term of office is to expire at a certain date after a general election, no other election to intervene, the electors take notice the office is to be filled at such general election. Some decisions have gone so far. But it is well settled that when a vacancy has occurred by reason of death or resignation the voters are not bound to take notice of such vacancy, and the casting of votes for a candidate or candidates to fill the vacancy does not constitute an election. The facts of the present case bring it within the principle of the decisions which hold that, in cases of special elections to fill a vacancy, a proclamation is necessary, even although the special election be held at the same time as a general election. The principle is that a notice by proclamation is necessary whenever the voters are not bound by law to take notice of the time of the election and of the officers then to be chosen.

The contrary not being averred in the petition, it must be presumed that the governor, who had approved the act of 1883, issued his proclamation for the election of a member of congress in each of the districts defined by that act.

The general rule is that all are bound to know the law. But the recognition of this general rule does not compel us to hold that the electors, as matter of fact, knew that the act of 1883 was of no force or effect. It does not compel us to hold that, as matter of law, the electors throughout the state were bound to know under penalty of disfranchisement, that a statute regular in form, certified to have been properly passed by the appropriate officers; published as other statutes are published; approved by the governor, and by him

acted under when he issued his proclamation, was *void*, because of matters not appearing on the face of the statute, but which could be ascertained only by an examination of the journals of the two houses of the legislature; that thus taking notice of the invalidity of the act of 1883, the electors were bound to know that the law of 1872 was still in full force and operation.

That the electors did not know all it is claimed they ought to have known is apparent from the matters set forth in the petition, and from the fact that the petitioners have found it necessary to ask that the secretary of state be prohibited from estimating the votes cast for members of the house of representatives of the United States in the respective districts created, or attempted to be created, by the act of 1883.

Courts of justice in this state take judicial notice, perhaps, of the contents of the journals of the two houses of the legislature; the citizens at large are not required to take legal notice of the entries in the journals. The people had not actually been notified of such entries when the election was held. They had before them (let us assume) the statute of 1883, approved by the governor and published as statutes are required to be published, and the governor's proclamation. We are asked to decide that all the voters should have inquired whether the statute was invalid by reason of matters of which they had not been notified; that the duty was imposed upon them to make investigation into the history in the legislature of the bill for the act of 1883; to consider questions as to the validity of the law arising out of the proceedings in the legislature which preceded its final passage; to determine such questions correctly, or as petitioners claim they should be determined (questions, it may be, difficult of solution by the courts, with the aid of counsel learned in the law), and then to vote for officers not mentioned in the governor's proclamation, in districts not defined in the law so as aforesaid to be mentally determined to be invalid, and not recognized as continuing in existence by the executive or other officers of the state. Thus to decide would be a formal acknowledgment by this court of results which cannot be treated as an intelligent and binding expression of the voice of the people, and which are entirely beyond any consequence legitimately derivative from the maxim that all are supposed to know the law.

Whether anybody else was or was not elected to the house of representatives of the United States at the general election, we are quite certain that the petitioners were not.

Writ denied and petition dismissed.

MCKEE, J., THORNTON, J., and MORRISON, C. J., concurred.

ROSS, J., CONCURRING. I concur in the main, in the views expressed by Mr. Justice McKinstry. I wish to add that, in my opinion, the act of 1883 is a constitutional and valid law.

Section 15 of article iv. of the present constitution provides: "No law shall be passed except by bill. Nor shall any bill be put

upon its final passage until the same, with the amendments thereto, shall have been printed for the use of the members, nor shall any bill become a law unless the same be read on three several days in each house, unless, in case of urgency, two-thirds of the house where such bill may be pending shall, by a vote of ayes and noes, dispense with this provision. Any bill may originate in either house, but may be amended or rejected by the other; and on the final passage of all bills they shall be read at length, and the vote shall be by yeas and nayes upon each bill separately, and shall be entered on the journal; and no bill shall become a law without a concurrence of a majority of the members elected to each house."

It is earnestly insisted by the petitioners for the writ that under this provision of the constitution it is requisite to the validity of a bill that each and every amendment thereto should have been read on three several days in each house. It is very certain that the constitution does not so provide in terms. The provision with respect to the passage of bills is extremely explicit. Express authority is given for the amendment of any bill in either house, and it is expressly declared that no bill shall be put upon its final passage until the same, *with the amendments thereto*, shall have been printed for the use of the members. If it had been intended to provide that, except in case of urgency, no bill shall become a law unless the same, *with the amendments thereto*, be read on three several days in each house, it would have been an easy matter to have said so. The insertion of the words "with the amendments thereto," in the first clause and their omission from the second is, to my mind, very strong evidence that the clause from which they were omitted was not intended to apply to them.

In Miller v. The State, 3 Ohio St., 479, it appeared that a bill originally introduced in the senate, after being read twice, and on different days, was committed to a select committee, who reported it back with one amendment, to wit: "Strike out all after the enacting clause and insert a new bill;" that on a subsequent day, April 12th, this amendment, after being itself amended, was agreed to, and the bill, as amended, ordered to be engrossed and read a third time to-morrow; that on the morrow, April 13th, it was "read the third time" and passed, and having afterward passed the house, and been duly enrolled, was signed by the presiding officers of the two houses, filed in the proper office and published among the laws. The constitution of the state then provided that "every bill shall be fully and distinctly read on three different days, unless, in case of urgency, three-fourths of the house in which it shall be pending, shall dispense with this rule."

In that case, it was claimed, as it is claimed here, that the amendment was in fact a "new bill," and that it was only read once, and, therefore, invalid under the constitutional provision quoted. In the course of the opinion, the court, speaking through Judge Thurman, said: "But, for argument's sake, let it be admitted that the bill as amended was read but once in the senate; is the act for that reason

void? That, counting the two readings before the amendment and the final reading, the bill was read three times, is conceded, for these readings are shown by the journal, and it is also conceded that, in general, three readings of an amendment are not necessary. But, inasmuch as the amendment in this case is styled in the journal a 'new bill,' it is said that three readings were necessary. Why necessary? The amendment was none the less an amendment because of the name given it. It is not unusual in parliamentary proceedings to amend a bill upon striking out all after the enacting clause and inserting a new bill: Jefferson's Manual, sec. 35. 'When the subject or proposition of the bill is thereby wholly changed, it would seem to be proper to read the amended bill three times, and on different days; but when there is no such vital alteration, three readings of the amendment are not required."

What is here said by the learned judge covers both points made by the petitioners, for, apart from their claim that every amendment must be read in each house on three several days, it is contended that the purported amendment to the bill in question was in fact no amendment, but a new bill. The original bill was one to divide the state of California into congressional districts, and the amendment adopted did but change the lines of the districts as fixed in the original bill. "The subject or proposition of the bill" was not at all changed. When that is done, the bill as amended should undoubtedly, as observed by Judge Thurman, be read on three several days, for it then becomes in effect a new bill; but not so, when there is no such vital alteration.

In the case of The People v. Wallace, 70 Ill., 680, the supreme court of that state held that the constitutional provision of the state requiring bills to be read on three several days before their passage, did not apply to amendments, the court saying: "It is also objected that the tenth section of the act was not constitutionally adopted, because it was engrafted as an amendment whilst the bill was being considered, and was not read on three several days in the house adopting it as an amendment. We are clearly of opinion that the requirement does not apply to an amendment, and the objection cannot prevail." See, also, McCulloch v. The State, 11 Ind., 434-5. Nothing here said conflicts with the decision in Weil v. Kenfield, 54 Cal., 111, of the correctness of which I have no question.

MYRICK, J. For the reasons given in the the opinion of Mr. Justice Ross, I am of the opinion that the act of 1883 is constitutional and valid. I, therefore, concur in the judgment.

No. 9,860.

ENOS *v.* SUN INSURANCE COMPANY.

Department One. Filed October 30, 1885.

FIRE INSURANCE—NOTICE TO AGENT OF INSURER—WHEN NOT BINDING.—Where an insurance company, in its contract with the insured, expressly exempts itself from being bound by "any act or statement" not contained in the written application for the policy, or indorsed on the policy, notice to its agent as to anything different from what the policy and application contained, will not bind the company.

THE SAME—WAIVER OF CONDITIONS MUST BE ENDORSED ON POLICY.—So, also, the local agent of the company cannot waive any of the provisions of the policy, except by written endorsement made on the policy or on the application, when the policy provides that anything less than a distinct, specific agreement, endorsed or attached to the policy, shall not be construed as a waiver of any condition or provision of the policy.

THE SAME—WHAT INCLUDED IN WORD "BUILDING"—FISHING SCOW—In determining whether a fishing scow was, in the policy of insurance, included in the word "building," and thereby affected by all the terms and conditions of the policy as a building, evidence that similar scows, as well as the one in question, were used and occupied as buildings, for purposes of residence and business, is admissible.

APPEAL from a judgment of the superior court of Sacramento county, entered in favor of the plaintiff, and from an order denying the defendant a new trial. The opinion states the facts.

Grove L. Johnson, for the appellant.

Freeman & Bates, for the respondent.

FOOTE, C. Action on a fire insurance policy. The plaintiff had judgment for the amount claimed; the defendant moved for a new trial which was denied. From the order made therein and the judgment, an appeal was taken. The case was tried by a jury.

One of the questions involved in it was, whether or not, the fishing scow which was insured, was in the policy of insurance included in the word "building," and thereby affected by all the terms and conditions of the policy as a building. The defendant contended that it was so included, and that, therefore, it being *unoccupied* both at the time it was insured, and at the time it was burned, the plaintiff could not recover.

Another was whether or not the scow belonged at the time the policy was issued, and it was burned, to the plaintiff, or to one Valine.

The policy in question, among other things, contained the following clauses:

"1st. The assured covenants that every fact and circumstance affecting the risk or hazard adversely to this company has been fully made known to the company.

"2d. That this company shall not be bound by any act or statement which is not contained in the written application or indorsed on this policy.

"3d. *Waiver*. The use of general terms or anything less than a distinct, specific agreement, indorsed or attached to this policy, shall not be construed as a waiver of any printed or written condition or restriction herein.

"4th. Conditions voiding this policy, without written permission indorsed hereon, or stated in writing in the application for

this insurance * * * or if the above described building or buildings, or either or them now are, or shall become vacant or unoccupied."

According to the second clause, it seems that the Sun Insurance Company, in its contract with the insured, had expressly exempted itself from being bound by "any act or statement" not contained in the application for the policy, or indorsed on said policy. Hence, no notice to its agent as to anything different from what the policy and application contained, would bind the company, and the defendant's instruction No. 4, on this point asked, should have been given.

Instruction No. 3, should have been granted, as the local agent, according to the terms of the policy, could not, as claimed, waive any of the provisions of the policy; it could only be done by writing on it or the application: Shuggart v. Lycoming Fire Ins. Co., 55 Cal., 408–43; Gladding v. Ins. Assn., 4 West Coast Rep., 107; McCormick v. Springfield Fire Ins. Co., 5 *id.*, 230–232; Silverberg v. Phœnix Ins. Co., 6 *id.*, 482–484.

The defendant offered to prove by the witness, Frank I. Lewis, who had been for fourteen years engaged in the fishing business, on the Sacramento river, that scows of the kind and character as the one insured were used and occupied as buildings by the persons owning them. That in the fishing season such persons used them as residences, and places of business, and that when the fishing season was over they used them as residences on land. That this particular scow was so used, and that in the same locality as that of the one in controversy other scows were so used.

This evidence so offered was admissible. And upon it and the circumstances surrounding the transaction, it would have been proper for the court by instructions, to have left the jury to determine as a matter of fact, whether or not the parties making this contract of insurance, intended that all the limitations and conditions thereof, should apply to the scow as a building. This testimony having been excluded, the instructions on the point became useless and misleading.

None of the testimony as to conversations with Hoagland was competent. Nor was the proof offered by the defendant as to what consideration Enos had paid for the scow, as there was no question of a fraud on creditors involved in the case.

In so far as the charge of the court announced the law to be different from what we have indicated it to be in this case, there was error.

The judgment and order should be reversed and the cause remanded for a new trial.

BELCHER, C. C., and SEARLS, C., concurred.

BY THE COURT. For the reasons given in the foregoing opinion, the judgment and order are reversed, and cause remanded for a new trial.

No. 11,284.

PEOPLE, EX REL., ETC. *v.* STROTHER, AUDITOR, ETC.

In Bank. Filed October 30, 1885.

THE AMENDMENT OF SECTION 9, ARTICLE XIII, OF THE CONSTITUTION OF 1879, was properly adopted.

APPLICATION for a writ of mandate.

E. C. Marshall, attorney general, W. T. Baggett and *Hall & Rodgers*, for the petitioners.

Doyle, Galpin & Scripture, for the respondent.

MYRICK, J. Application for mandamus to compel the auditor of the city and county of San Francisco to enter in his books an increase of the assessments by adding a per centage in accordance with the direction of the state board of equalization.

The reasons presented on behalf of the auditor why the writ should not issue, have been considered by us. For lack of time, we cannot enter into a full discussion, in this judgment, of those reasons. As the time for performing the duty is rapidly passing, it is of more immediate importance to know the duty than its reasons. Other cases are before us involving some of the questions here concerned; and in those cases we shall give our views more at length.

The substantial question involved, is whether the amendment of section 9, article xiii., of the constitution, was properly adopted. Independent of that question, there is but little in the objections urged on behalf of respondent; no matter appears to us which renders it impossible for him to comply with the order.

We are of opinion that the amendment referred to was constitutionally adopted.

Let the writ issue as prayed for, forthwith.

ROSS, J., MCKINSTRY, J., and MORRISON, C. J., concurred.

No. 8,479.

SHEARER *v.* CITY OF OAKLAND.

Department One. Filed October 31, 1885.

JUSTICES OF THE PEACE—ACT OF APRIL 1, 1880, CONSTRUED.—Section 103, of the act of April 1, 1880, entitled "an act to amend part one of the code of civil procedure, and each and every title, chapter, article, and section of said part one, and substituting a new part one to take the place thereof in said code, relating to courts of justice and various officers connected therewith," was intended to apply to justices of the peace elected at the general election in 1879, as well as to justices of the peace elected after the act took effect.

APPEAL from a judgment of the superior court of Alameda county, entered in favor of the defendant.

Sextus Shearer and *J. G. M. Callum*, for the appellant.

J. M. Poston and *John Yule*, for the respondent.

THE COURT. The demurrer to the complaint was sustained by the court below on the ground that section 103 of the act entitled "an act to amend part one of the code of civil procedure, and each and every title, chapter, article and section of said part one, and substituting a new part one to take the place thereof in said code, relating to courts of justice, and various officers connected therewith," approved April 1, 1880, was only intended to apply to such justices of the peace as should be elected after it took effect. In this, we think the court was in error. There is nothing in the language of the act indicating such intention, and that the legislature in enacting it had in mind the justices of the peace elected at the general state election of 1879, of which the plaintiff was one, is shown by section 110, which reads: "The term of office of justices of the peace shall be two years from the first day of January next succeeding their election; *provided*, that all justices of the peace elected at the general state election of eighteen hundred and seventy-nine shall go out of office at the end of one year from the first day of January, eighteen hundred and eighty." In our opinion, the provisions of the act of April first, 1880, applied from its taking effect, as well to such justices of the peace elected at the general election in 1879, as to those elected subsequently.

Judgment reversed, and cause remanded, with directions to the court below to over-rule the demurrer to the complaint.

No. 8,890.

SWEENEY ET AL *v.* STANFORD.

In Bank. Filed October 31, 1885.

PARTNERSHIP—FICTITIOUS FIRM NAME—CERTIFICATE—PLEADINES.—A complaint, in an action by partners, to enforce a partnership contract, which discloses the fact that the contract was made by the partners in their fictitious name, is demurrable, unless it be alleged that the plaintiffs have filed the certificate of partnership required by sections 2,466 and 2,467 of the civil code. If such fact be alleged, the plaintiffs must prove it, in order to establish their case.

THE SAME - FAILURE TO FILE CERTIFICATE—ABATEMENT OF ACTION.—Where the complaint fails to disclose that the plaintiffs fall within the provisions of section 2,466 of the civil code, to avail the defendant, the failure to file the required certificate must be set up in the answer as a defense to the action. In either case, the action would only abate, and would not be a bar to another action brought after compliance with the provisions of the statute.

APPEAL from a judgment of the superior court of the city and county of San Francisco, entered in favor of the plaintiffs, and from an order denying the defendant a new trial. The opinion in department is reported in 6 West Coast Rep., 244.

H. L. Brown and *John E. Foulds* for the appellant.

E. P. Cole, for the respondents.

ROSS, J. By statute in this state, every partnership, except commercial and banking partnerships established and transacting business in a place without the United States, transacting business in

the state under a fictitious name, or a designation not showing the names of the persons interested as partners in such business, is required to file with the clerk of the county in which its principal place of business is situated, a certificate signed by the partners and acknowledged before some officer authorized to take the acknowledgment of conveyances of real property, stating the names in full of all the members of such partnership, and their places of residence, and publish the same once a week, for four successive weeks, in a newspaper published in the county, if there be one, and if there be none in such county, then in a newspaper published in an adjoining county: Civil code, sections 2,466-7. By a subsequent section, 2,468, it is provided that "persons doing business as partners contrary to the provisions of this article shall not maintain any action upon or on account of any contracts made or transactions had in their partnership name, in any court of this state, until they have first filed the certificate and made the publication herein required." This is statute law, is very plain, and must be given effect.

The complaint in the present case shows that the plaintiffs are partners under a designation not showing the names of the persons interested as partners, and counts upon a contract made in their partnership name. The statute in terms declares that persons thus doing business shall not maintain an action upon such a contract unless they shall have filed the certificate required by the section cited. Manifestly, therefore, *with the averments in respect to the partnership and the contract*, the complaint would have been demurrable had it failed to have alleged compliance with the condition imposed by the statute as a pre-requisite to the maintenance of the action. And being, under such circumstances, a necessary averment, it was, of course, necessary for the plaintiffs to prove a substantial compliance with the condition, the allegation in that regard being denied in the answer: Fabian v. Callahan, 56 Cal., 161. Of course, where the complaint fails to disclose that the plaintiffs fall within the provisions of section 2,466 of the civil code, to avail the defendant, the failure to file the required certificate must be set up in the answer as a defense to the action. In either case, the action would only abate, and would not be a bar to another action brought after compliance with the provisions of the statute: Byers v. Bourret, 64 Cal., 73.

It results from what has been said that, as there was a failure on the part of the plaintiffs to show a compliance with the statute in regard to the certificate of partnership, the court below should have granted the defendant's motion for judgment of nonsuit.

Judgment and order reversed and cause remanded for a new trial.

MCKINSTRY, J., THORNTON, J., MYRICK, J., MCKEE, J., and MORRISON, C. J., concurred.

WEST COAST REPORTER.

WHOLE NO. 98. NOVEMBER 12, 1885. VOL. VIII. No. 2.

CIRCUIT COURT, DISTRICT OF CALIFORNIA.

GOLDMARK ET AL. *v.* KREELING ET AL.

October 23, 1885.

INJUNCTION AGAINST UNLAWFUL PRESENTATION OF OPERA, WHEN ISSUED.—The owner of a literary work, such as an opera, not protected by a copyright, is entitled to an injunction against its unauthorized presentation, upon giving approved security. In such case the right to recover damages for the unlawful production of the opera, is not an adequate remedy.

THE SAME—PRELIMINARY INJUNCTION—ADDITIONAL SECURITY MAY BE ORDERED.—Where a preliminary injunction is granted, upon complainants giving a bond, if counsel for the respondents have not had an opportunity to be present at the approval of the bond, the court, sitting as a court of equity, has power, upon petition, promptly made, or affidavit, showing the sureties to be insufficient, and notice to the other side, without regard to other proceedings, at any proper stage of the case, to require an additional bond to be given, as a condition of the continuance of the injunction. Such application should be promptly made, otherwise the right to object will be deemed waived.

THE SAME—RIGHT TO INJUNCTION WHEN NOT LOST BY FAILURE TO FURNISH SECURITY IN TIME.—The complainants, as owners, filed a bill to restrain the defendants from unlawfully producing the opera of "Nanon." Such opera had never been copyrighted. An order to show cause why an injunction should not be granted, was issued, returnable on a day fixed. After several delays, no cause being shown against it, an injunction was issued, on condition that the complainants give bond in the sum of ten thousand dollars. The bond offered being deemed insufficient by the court, the injunction was dissolved upon the defendants filing an indemnity bond. The complainants thereupon moved to set aside the order dissolving the injunction, at the same time offering a certified check for ten thousand dollars, or an equal amount of coin, as security. *Held*, that such order should be granted; that complainants' right to an injunction was not lost by reason of their failure to furnish a sufficient bond in the first instance.

DISTINCTIONS BETWEEN THE PRESENT CASE AND CASES INVOLVING the infringements of patents and copyrights, so far as the complainants' right to a preliminary injunction is concerned, stated and discussed.

Before SAWYER, circuit judge, and SABIN and HOFFMAN, district judges.

This is a suit in equity to enjoin the production of an opera of which complainants claim to be the proprietors,—a suit resting upon the common law right of the author, not on a copyright.

The sureties offered on a bond required to be given by a prescribed day upon the granting of an injunction, after several hearings, having failed to justify to the satisfaction of the district judge of Nevada, before whom the proceeding was presiding, he dissolved the injunction upon that ground, upon defendants giving a satisfactory bond in the sum of ten thousand dollars, to pay such sum to complainants as should be recovered in the suit. The complainants on affidavits, showing their good faith, and excusing their fail-

ure to present sufficient sureties at the proper time, promptly moved, before respondents' bond was approved, to vacate the order dissolving the injunction, upon the indemnifying bond given by the defendants, and to restore the injunction before granted; and they offered to deposit a certified check upon some solvent bank for the required amount, or to deposit the coin in court, in lieu of a bond. The application was denied, but, the point being new, and not being entirely satisfied with this action, the judge, who heard the application, granted a rehearing, and, upon such rehearing, invited the circuit judge and the district judge for the district of California to sit with him.

After argument on the rehearing the following oral decisions were rendered.

Jos. D. Redding, for the complainants.

H. H. Lowenthal and *W. W. Cope*, for the respondents.

BY THE COURT—SABIN, DISTRICT JUDGE. I do not deem it necessary to review, at length, the history of this case, as it is certainly very well understood by counsel and probably by the bar who have been in attendance. We deem the case a very important one. I believe it is the first case of the kind that has ever been brought in this court. While innumerable cases have been brought on copyrights and patents, etc., I believe this is the first case brought in this court, or, possibly, upon this coast, wherein a complainant has sought to restrain a defendant from producing a play, or any matter of this kind, not upon copyright, but upon common law right.

I have been inclined to look at this case very much from the standard of cases that are brought upon patents and upon copyrights. I am inclined to think there is a distinction in the cases, and nearly all the cases cited to the court during the argument on this matter have been cases upon copyrights or patents. There have been, perhaps, three or four cases cited to the court very similar to this, where parties have sought to enforce their common law rights. They are different, however, from this case, in this: In those cases it was upon motion and argument before the court whether or not an injunction should issue, and not, as in this case, where no argument has been made before the court as to whether or not an injunction should issue. It was conceded in this case, virtually at least, that it was a proper case for an injunction to issue. No opposition, as I understand, has ever been offered to its issue. There has been no contest on the sufficiency of the bill in this case, therefore, the injunction issued regularly thereupon. The only question, really, before the court, as I observed yesterday, is: Was the order made by myself on the sixteenth of this month, dissolving the injunction upon the defendants' giving security, under all the circumstances of the case, a complete and full indemnity to the complainants in this case?

I do not care to review, at all, my action in regard to the sureties in this matter. I merely desire to say, now, that the bonds tendered

in this matter, thus far, are not satisfactory to me, nor am I at all satisfied with the manner in which the matter was conducted. I think bonds could very easily have been procured by complainants. It was only a small amount—ten thousand dollars—and I have merely to observe now that I do not think the security thus far offered in the case, by complainants, was such as the court ought to have accepted. I think that my action, in that respect, was entirely correct. Of course, when a bond is given, it is given in good faith and for indemnity to the parties who may suffer injury in the action, if the complainant should not succeed in his case. Without any further remark on that, I have merely to say that I do not think the bond afforded the security that it was the duty of the court to enforce in a case of this kind. But I am not wholly satisfied that the indemnity afforded by the order of the court, that the respondents give a bond of ten thousand dollars, is a full and adequate remedy for the complainants in this case.

As I observed, this case is different from a suit brought to restrain an infringement of a patent, or of a copyright, and there is great force in the point urged that if any parties are permitted, in violation of complainants' rights, to produce this play, it may, and possibly would, cause irreparable damage to the complainants, if they are the lawful owners of this opera of "Nanon," and they only have the right to produce it. As the matter now stands on the bill, unquestionably they are the lawful and exclusive owners, and have the exclusive right to produce it.

There is also, to my mind, great force in the suggestion that the owner, as in this case, of a play or opera, or other property not protected by patent or a copyright, is entitled to select his licensee. One party might produce this individual opera, and, perhaps, the complainant might suffer no very great damage. It might be an advantage in the way of an advertisement, or otherwise. Another party might produce it, and it might be of the very highest detriment to the complainant, and absolutely ruin its production elsewhere. As to who shall produce it, even if, as in this case, the parties owning it do not produce it, but merely license other parties to produce it, they have the most indubitable right to say who those parties shall be. I am inclined to think that, perhaps, I gave too much weight to the idea that in the giving of indemnity by these respondents, they were giving ample security to the complainants. If I was in error in that, of course the order should be corrected.

We have given this case unusual attention. I have invited Judges Sawyer and Hoffman to sit with me. I have desired to be guided by their very large and varied experience in matters of this kind, for my own experience has been somewhat limited, and this is the second argument I have ordered on this matter. We have given it very careful and anxious consideration, not only to be right as to these complainants, but to be right as to any and all parties, to establish the true and correct rule.

I am inclined, then, as I say, to think that perhaps in the order made by me on the sixteenth, I may have overestimated the security I was giving to the complainants in this case; that perhaps I should have given them still further time to have procured sufficient bondsmen. It is true, parties offered on that day, about the time the court was announcing its opinion, to furnish a certified check in the sum of ten thousand dollars. It was either offered at that time, or to be ready by two o'clock. I declined that, at the time, for the simple reason that I thought sufficient time had been afforded them, and that the security which I would require the respondents to give would be ample indemnity to complainants. I now think under the authorities, and under what may occur in this or any like case, that that indemnity is not full and ample. I am inclined to the opinion that nothing but an injunction in the first instance will reach the case.

A motion can always be heard either on the coming in of the answer, or a motion can be heard at any time to dissolve the injunction on affidavits. Of course no steps of that kind have been taken in this case. It stands merely on the bill as presented, without objection made to the bill.

MR. COPE.—We could not have done that without waiving our objection to the bond.

JUDGE SABIN.—I do not think that would have obtained in this court. In any event, the court, in justification of itself, would have required good security to be given. I would have given you an order to show cause on these sureties, at any time. This might often happen. You might give a bond which would be ample to-day, and three months hence a surety might die, and an order to show cause would be granted why you should not produce further security.

An offer was made the other day by complainants in this case to deposit gold coin in court, if the court should order it, or a certified check. If the money should be paid into court, it would have to be paid into the treasury, and it is considerable trouble to pay it in, and get it out. A check, therefore, is more satisfactory. I think, therefore, the order, as made the other day, should be vacated, or at least, modified, and the order of the court will be that the order made on the sixteenth, dissolving the injunction, be vacated; that the injunction heretofore issued be continued, upon the complainants depositing with the clerk to-day, by three o'clock, a certified check payable to the order of the clerk in his official capacity, as clerk of the court, in the sum of ten thousand dollars, upon some solvent bank in this city. Leave will be granted to the complainants, at any time, upon notice, to withdraw the check upon giving good and ample security in place of it. Notice of the application and the names of the sureties intended to be offered must be given. I do not want any question to arise again as to the examination of sureties, and their sufficiency.

SAWYER, CIRCUIT JUDGE, CONCURRING. I have considered this matter very carefully, and have come to the same conclusion as my associate. There was an order to show cause, with a preliminary restraining order, granted. The parties appeared, in response to that order, and, upon the hearing, an injunction was granted by the district judge of the district, till the further order of the court, with leave to the parties to move to dissolve it. The parties did not see fit, or were not prepared, to present any matters outside of the bill. The injunction was continued, upon condition that by a specified day a bond should be given in the sum of ten thousand dollars, to be approved by the clerk. A question arose upon the sufficiency of the proposed securities upon that bond. The clerk was about to pass upon the bond, when an application was made to the court, and granted, to transfer the question of approval to the court, and the matter was considered by my associate, the district judge of Nevada, then holding the court, during my absence in Oregon.

He did not assume to review the prior action of the court as to the injunction granted,—either the proceedings of the circuit judge in granting the preliminary restraining order, or of the district judge of this district in granting the injunction on the hearing of the order to show cause. The only question was as to the sufficiency of that bond,—whether the parties had conformed to the conditions of the order granting the injunction.

As the matter stands, the injunction granted rests solely upon the bill, and we are satisfied that the bill presents a sufficient ground for the injunction. There was some delay, and the impression upon the mind of my associate was, that the parties were not acting in good faith. One surety, who had been rejected once, was offered again. I am, perhaps, partly responsible for the decision of my associate upon the point under consideration. On my return, I found that he had had several hearings upon the justification of the sureties,—indulgence having been given from time to time,—and, from what had taken place before, he was apprehensive that, on Friday, the day fixed for the next hearing, there might still be further delay. Expressing his apprehension to me, we consulted, and I was of the opinion then, that in case there should be further delays, and especially if there should be indications of trifling, the defendants were entitled to have the injunction dissolved, on their giving proper indemnity to complainant.

But I had not fully considered the case. It presented questions entirely new to me, and my suggestions, upon imperfect knowledge of the facts, may have influenced my associate in making the order in question. If so, I am willing to take my share of the responsibility. When the examination came on, it turned out, that the surety was again rejected, and when the judge was about to announce his decision,—indeed, not till he was in the act of announcing it,—an offer was made to deposit the money, but the offer was regarded, at the moment, as coming too late, and, the order complained of made. The only question is: Whether that offer ought,

under the circumstances, to have been accepted. There had been some provocation. The court was impressed with the idea, doubtless, that it was being trifled with. On the application to modify that order, I think the parties have, satisfactorily, shown by affidavits that they acted in good faith. They, perhaps, ought not to have offered a rejected surety again. I think they were at fault in that. Still, I am not only satisfied, that the solicitor for the complainants, whom I have known for years, was acting in entire good faith, but I believe him to be incapable of acting otherwise. I think under the circumstances, also, that the complainant, a stranger just arrived from New York, his financial condition being unknown here, and he being in these particulars in an embarrassing position, was acting in good faith.

That being so, upon a review of this matter, as it now appears to me, I am satisfied that further opportunity should have been given complainant on that occasion to perfect his security, even though the money was not tendered till after the judge had commenced to announce his decision.

With reference to the indemnity which was given by the respondents, although the amount was sufficient, and the bond good, it, in my judgment, affords no adequate remedy, if any remedy at all. This case differs from a patent case. Take, for instance, a patent for a sewing machine. A party may, in good faith, think that a machine of a certain construction, different in form, but in reality the same in principle, as the one patented, is not an infringement. There is, generally, in the case of patented articles, a royalty established, upon the payment of which, any man is allowed to make, or use the patented machine, or article. A large manufactory may be erected, and the manufacture of sewing machines, or other patented articles, be commenced, and it may turn out that there is an infringement on a patent, although the point, at the hearing of the application for an injunction, may appear doubtful. To stop that work, pending the suit, would be ruin to the manufacturer, even if he turns out to be in the right, whereas, all that the patentee wants, or can obtain, in case he succeeds, is his damages, and a remuneration according to the amount which he has fixed as his royalty. Providing he can get that, the more machines there are manufactured and sold, the better it is for him. In such cases, in matters of doubt, whether the machine is an infringement or not; whether the patent is valid or not; or whether it has been anticipated or not, where the complainant can be fully indemnified if he succeeds, and where the defendant would be ruined by an injunction, if the complainant fails to sustain his suit, courts, in view of the great disproportion of the hardship that may result to the respective parties, have, very often, declined to grant or continue an injunction on the infringing party's amply indemnifying the patentee. An adequate indemnity is given, where the patentee's royalty, profits and damages are perfectly secured. In these classes of cases, there is, usually, some tangible, appreciable, fixed, and ascertainable measure of the amount to be recovered.

Besides, in a patent case, by the express terms of the statute, a patentee in a suit in equity to enjoin an infringer can, not only, recover the profits, or royalty, but, also, any damages he may sustain in addition to the profits. It often happens that the profits of an infringer in a patent case are greatly less than the damages sustained by the patentee, by the infringement; because the patentee is entitled to fix his royalty, and to fix the price for which he will sell his invention, and that must be sufficient, to give him his established compensation for his invention, in addition to the cost and profits of manufacturing.

Take a sewing machine, and suppose the royalty is fixed at fifty dollars, over and above the profits of the manufacture,—and I think some are higher,—the infringer may manufacture, and sell, at such low prices, as to give him a bare profit on his investment, and the manufacture, so that the profits might be just enough to compensate for his investment and labor, leaving nothing for the royalty. The patentee, however, in addition, is entitled to recover his royalty. The profit which the infringer may make at the price he sells, would often afford no compensation to the patentee for his invention. He would be remediless if that were his only right. The act of congress, itself, provides, that the patentee may, not only, recover the profits, but, under the statute, he can recover his damages in the same suit, in addition to the profits. Not only that, but the court is authorized to treble the damages, in order that the patentee may be completely, and thoroughly, indemnified against the acts of the infringing party. That is all by virtue of the statute. Otherwise, if he wanted damages, he would have to proceed by his action at law. The statute authorizes him to demand both of these remedies in the same suit, and then authorizes the court to treble the damages. I myself have had occasion to impose the penalty, where the infringement has been a gross and willful violation of the patentee's right, and where the infringement has been continued by the same party after one or more recoveries.

So, in a copyright case, the only compensation for the party owning the copyright, is, the amount he charges for his copyright fees. He fixes his copyright fee. If this were a case of copyright, there would be a distinct, definite, appreciable, fixed, ascertainable measure of damages, which would be the copyright fee, and no matter who infringed the copyright, when he has paid that fee he has paid the full amount the party himself is entitled to receive, and the more there are sold, the better he will be off, provided his fee is perfectly secure. His right exists under the statute. Under the statute both the profits and the damages might be recovered in the same suit. An indemnity in doubtful cases, secured for the infringement during the litigation, would afford an ample remedy.

But this case is wholly outside of any statute. It rests simply upon the common law. A party has either his action at law for his damages, or his bill in equity to restrain the defendant, and recover such profits as he can obtain. The only measure of his com-

pensation in a suit in equity would be the profits received by the wrong doer. That is all that would be recovered in this case. The bond given by the defendants, in fact, only provides for the payment of such profits as may be recovered by the violation of complainants' rights in this case. What is the measure of the compensation in this case? There is no definite measure. The profits are merely conjectural. There may be no profits. The parties who infringe the complainants' right may put their prices at such figures that there could be no profits. The injured party must go to them to ascertain what their profits are. The expenses, and the prices of the representation, are under their control; and the performance may only be ancillary to some other business upon which they rely for their principal profits. It will be safe to say that the profits recovered are likely to be very limited.

Prior to the filing of this bill there were two performances. The bill simply asks for an accounting of the profits down to that date. There were two performances that would be covered, unless the bill is amended, or the complainants, are, otherwise, entitled to the profits down to the accounting, and the profits that can be proved are certain to be very small. There is no knowing how long the infringement may go on before the final decree, or under what circumstances. The interest of defendants will be to delay a final hearing as long as possible. The opera may be performed under such circumstances as to render its performance by the owner futile. The owner is entitled to select his licensee, and to determine the conditions upon which his work shall be presented. This must be essential to any adequate protection, and any proper, complete enjoyment of his property.

On the bill, as it now stands, there is an absolute right to this injunction, upon giving the proper security. This is the only adequate remedy. As we now regard it, we hold the bill to be sufficient. What view we may take after argument, or on a showing upon any application to dissolve, that may be made, I do not know. There is, then, a right to this injunction, or to some equally adequate remedy, and the indemnity by giving bonds, is, plainly, not an adequate remedy. Where the profits are under the control of, and depend upon, the acts performed and evidence furnished by the infringing party, there is likely to be a very poor compensation if this case should run on for some time. The profits are liable to be extremely small, so far as the complainants would be able to prove them. A bond for these profits, we are satisfied, would afford no reasonable remedy. The case, as we have seen, is not like that of a patent, where it makes no difference who makes the machine, provided the patentee gets his royalty. It is not like a copyright case, where the right and measure of compensation are fixed,—where the main elements by which the amount can be determined are known beforehand. In this case, the amount is indeterminate, and depends altogether on the action of the party who wrongfully infringes the rights of the complainant—who tortiously appropriates complainant's property.

In view of these considerations, I think the distinction between the cases of patents and copyrights, and this case, very broad. It is true, in one or two cases recently reported in the newspapers, a similar order was made, but it was not made under similar circumstances. That order was made on the hearing of an application for the injunction, where the defendants came in and put in their proofs, and made a very strong case. Take the most prominent case, Tracy v. Janisch. The defendant put in her proofs fully, by affidavits. It appears, according to the numerous affidavits, that defendant was a citizen and resident of Paris, and she alleges, and the proofs went far to show, that the work had been published in that city from year to year, for some years, with the owner's knowledge and consent, and that the complainant's right had been, consequently, lost. A number of affidavits were put in to sustain the proposition. It was extremely doubtful, whether the complainant had any rights or not. That was on the hearing of the application. If this was on the hearing, that case would have some application, and it would be proper to quote it. But there, it was a case of extreme doubt, whether the party was entitled to an injunction at all. If not, the hardship on defendant was peculiar and great. Her injury would have been irreparable, had she been enjoined, and the court exercised its power, under the great hardship of the case, because the defendant had had the work prepared from what she maintained was a public work in Paris; had come to this country expressly to perform it; had organized her troupe; and had no other piece to perform. The failure to produce that piece, would be the loss of her season, and the entire destruction of her enterprise. Under these circumstances and proofs, it was extremely doubtful whether the injunction should be granted at all.

When this case comes to be heard on the answer, evidence and proofs, the court may find occasion to change its views. It may be, that there are some special circumstances to be developed, which will change the entire aspect of the case. But they are not yet developed, and on the case as it now stands, there is a right to this injunction, or some other adequate remedy, and we know no other that would be adequate. A sufficient certified check having been offered before the order for dissolution was made, I now think, the order dissolving the injunction upon the bond of defendants was made without due consideration of the inadequate remedy afforded, and the consequences to complainant.

I, therefore, consent to the present order.

With reference to the hardship that may occur in this case, it is proper to observe that no general appearance has yet been entered by the defendants, unless the appearance to respond on the bill to the order to show cause, can be held an appearance within the meaning of the statute. Whether or not it is, I am not prepared now to say. It was within twenty days of the rule day, when this suit was commenced, and the defendants had till the rule day of the following month, in which to appear. They had over forty days within

which to appear,—the rule day in November being the day upon which they would be required to appear. They could, therefore, rest on their oars until that time, and not appear. Having, formally, entered their appearance, they would then have until the rule day of the following month in which to answer, or demur. They were bound, however, to appear to the order to show cause. They did appear, and the injuntion was granted without a showing, other than on the bill, against it.

Suppose this injunction is dissolved, and defendants do not appear at all until the rule day, in November, and then take until the following rule day, which they have the right to do—because the law gives them that right—in which to answer. They may then demur. In that event, the case will go upon the demurrer calendar of the next rule day, and, under the press of business, it may be months before the demurrer is decided or regularly reached. It might be overruled, and a plea put in, and several months more be consumed in disposing of that plea. Then after, at last, filing an answer, there are three months in which the party is entitled to take testimony. Should this injunction be dissolved, the performance by defendants might run through a year or more, and everything there is worth having in this opera, so far as its performance on this coast is concerned, might be appropriated by the defendants, and at the end there be no profits, by reason of the expenses, manipulation, low prices, or improper production by the wrongdoers.

We think it would be a great hardship on the complainants, to allow the matter to stand in that position. These possibilities should be taken into consideration in determining the right of complainants to have the order complained of vacated. On further reflection we are satisfied that additional time should have been given to the complainant to produce other and sufficient sureties, or that the certified check should have been taken in lieu of them.

These are our more mature convictions. If I made a mistake in advising my associate on an imperfect knowledge at the time, of all the facts of the case, and without due consideration of the consequences of the action of the court, I am desirous now to correct my error. With all the care I take, mistakes will sometimes occur. So far as my responsibility, as to that order goes, I am prepared to remedy it now.

I desire, in connection with this matter, to make some other observations. There was manifestly a misapprehension on the part of counsel as to the practice of this court in a justification of sureties. It was insisted by counsel for defendants yesterday that they would have waived their right to object to the sureties had they come in with their affidavits and opposed this injunction, or had they moved, under the leave given in the order granting the injunction, to dissolve it. I think they are entirely mistaken. The two motions might have been made simultaneously, and gone on together, *pari passu*.

It was announced here that they were bound under the rules of the court to except in five days to the sureties, or there was a waiver. I stated at the time that I recollected no such rule. There is no such rule of this court. If there is, I have been unable to find it, either in the equity rules prescribed by the supreme court of the United States, or in the rules adopted by this court. Counsel seem to have been misled by the code of civil procedure. They are entirely mistaken as to the practice of this court.

Where counsel have not had an opportunity to be present at the approval of a bond by the clerk when it has been ordered to be approved by him, upon a petition to the court, made promptly, or affidavits showing the sureties to be insufficient, and notice to the other side, I suppose the court has full authority, without regard to other proceeding, at any proper stage of the case, to require an additional bond to be given, as a condition of the continuance of an injunction. Upon the equity side of the court, at least, I have no doubt that it is within the authority of the court in this manner to require insufficient security to be made ample; it is only on the law side that the practice act of the state in such matters prevails. Doubtless, the application should be promptly made, and an unreasonable delay would be regarded as a waiver of a right to object. But the matter would rest in the sound discretion of the court.

Again, after a bond is given, the sureties may become insolvent. I have no doubt of the authority of the court, upon a petition, stating the facts, and notice to the other side, to examine that matter, and if it is found that the sureties are insufficient, that additional sureties may be required. There must have been a misapprehension by the parties as to the practice on the equity side of this court, in that particular.

HOFFMAN, DISTRICT JUDGE, CONCURRING. I do not know whether I have a right to partake in this decision, or whether I form a part of the court. The circuit judge issued an order to show cause why an injunction should not be granted. That order was returnable on a day fixed. It came up before me. Counsel were not ready. It was postponed, by consent, to a further day. On that day counsel again announced that they were not ready. Thereupon the injunction issued, no cause being shown against it, with leave to move to dissolve at any time. The order was on condition that the complainant give security. They attempted to give security. I concur in all, and more than all, that my associates have said, as to the insufficiency of the sureties offered.

But the question is: Did the failure to offer that security forfeit the right to an injunction, and forfeit the rights of complainant, which he must be presumed to have, under the allegations of the bill? I think it did not. When he offered to remedy his previous neglect by depositing a certified check or money, the court obtained all it originally asked for, and the injunction should have gone, and

been continued, subject always to the right of the other party to move to dissolve it.

On this motion to review the action of the court, it appears to me that the question whether the injunction ought to be dissolved or not, upon a proper application and hearing, has no relevancy.

I do not pretend to have considered this matter as thoroughly as my associates have done. The bill in this case, it seems to me, is like a bill to restrain a person from destroying heirlooms or publishing family letters, where, if the thing is done, the injury is irremediable. It is easy to see that an accounting for profits would not afford any indemnity. It is the right of an owner of a piece of literary property to be protected. His pride as an author must be considered. He has the right to choose his own licensee. His play might be played for months, not at a profit, but at a loss. In the meantime, not only will the market be spoiled for a subsequent production by the owner of the opera in this town, but the reputation of the opera injured. It appears to me it is a case for an injunction. But that is not the point on which I base my concurrence, on the ruling of the court. I think that, on a review of the order dissolving the injunction, the question is, not whether the injunction should originally have gone, or should now be continued, but whether, under the circumstances, it ought to have been dissolved.

There is no absolute forfeiture of the right to an injunction because complainants have failed, under the circumstances, to comply with the order of the court requiring them to give security. If the opposite side are advised that the injunction ought to be dissolved, let them move to dissolve on notice to complainants.

LAKIN *v.* SIERRA BUTTES GOLD MINING CO.

October 26, 1885.

CONSTRUCTIVE TRUST.—Where one party, wrongfully, obtains the legal title to land, which, in equity and good conscience, belongs to another, whether he acts in good faith, or otherwise, he will be charged, in equity, as a constructive trustee of the equitable owner.

A BONA FIDE PURCHASER, is one who purchases, in good faith, an estate for a valuable consideration, actually paid, without notice of a prior equity.

BURDEN OF PROOF.—The burden rests on the party claiming protection as a *bona fide* purchaser, to prove affirmatively the payment of value, and, that the purchase was made without notice of the prior equity.

CONSIDERATION IN DEED NOT EVIDENCE.—An acknowledgment of payment of consideration in a deed, is not evidence of payment of value, as against the owner of the prior equity.

AGENCY—NOTICE.—The knowledge of an agent, in respect to the subject matter of the agency, is the knowledge of the principal.

ABANDONMENT, of a mining claim, is a voluntary act, on the part of the owner, and when relied on, as a defense, must be proved by the party alleging it.

FORFEITURE.—A party who has forfeited a mining claim by failing to work it as required by law, may continue his right by resuming work, at any time, before any other party has re-located on the ground of forfeiture.

PATENT SURREPTITIOUSLY OBTAINED.—T. and McG., being owners of a mining claim, had a survey made, applied for a patent, published the notice as required by the statute, and no adverse claims having been filed, their right to a patent became perfected. Afterward the M. Co. claiming, without right, to be successor in interest to T. and McG., surreptitiously, procured a patent to itself on the application of T. and McG. *Held*:—That the M. Co. held the

title so obtained, charged with a constructive trust in favor of T. and McG., and that it did not lie in the mouth of the M. Co. to say, that T. and McG., have lost their right to the claim by forfeiture, or otherwise.

STATUTE OF LIMITATIONS IN EQUITY.—The statute of limitations, as such, is not a defense in a court of equity of the United States. The defense in such court, is, laches in not pursuing the proper remedy, for such time, and under such circumstances, as renders it inequitable to grant the required relief.

ANALOGY TO STATUTE OF LIMITATIONS.—But courts of equity will adopt, by analogy, the time prescribed by statutes of limitations, unless there are other equitable circumstances, deemed sufficient to relieve the party from the charge and consequences of laches.

PLEADING OF LACHES, ETC.—No formed plea of the statute of the limitations, or of the special facts, is necessary to raise the defense of laches, neglect, or acquiescence, in a court of equity.

THE FOUR YEARS LIMITATION applies to this case, as stated in the eighth head-note, it not being, technically, a suit for "relief on the ground of fraud."

STATUTE OF LIMITATIONS—CONSTRUCTIVE TRUST—The statute does not begin to run against a *cestui que trust* in possession, until an ouster, whether the trust be express or implied.

LACHES.—What equitable circumstance will defeat the defense of laches, considered.

EQUITY. The opinion states the facts.

Vanclief & Gear, for the complainant.

Garber, Thornton & Bishop, for the respondent.

SAWYER, CIRCUIT JUDGE. This case was submitted more than a year ago, but soon after its submission, I was requested by counsel not to take the case up for decision, as negotiations for settlement were pending, and, probably, it would not be necessary to decide it at all. Consequently, I laid it aside. I have been informed recently, by counsel, that there is no hope of settlement, and a decision of the court will be necessary. I mention this as a reason for the long delay in deciding the case.

This is a suit in equity to enforce a constructive trust in favor of the complainant in certain lands and mines, patented to the Mammoth Gold Mining Company, and, which were afterward conveyed to the defendant. The material allegations of the bill, which are established by the evidence, are as follows:

In the year 1865, a certain quartz ledge in Plumas county, known as the Mammoth ledge, with the appurtenances thereto, two thousand one hundred feet in length along the vein, was owned and possessed by James M. Thompson, and John B. McGee, who, severally, mortgaged their interests therein to John Conly & Company. On November 4, 1865, said Thompson and McGee, in company with others, located an extension of said Mammoth ledge of the length of two thousand feet, the title to nine-tenths of which has since passed by mesne conveyances to the complainant. After the location of said extension, in the year 1867, said Thompson and McGee made a survey of their said claim, and, also, made at the Marysville land office, an application for a patent for the whole four thousand one hundred feet of the ledge, including a tract of surface ground consisting of two hundred and fifty-two ninety-five one-hundredths acres, they at the time owning the whole, subject to said mortgages on two thousand one hundred feet. Notice of the application for a patent was duly published, in pursuance of the statute, for the required period, and no adverse claims were filed. This survey and application covered the two thousand one hundred feet mortgaged to Conly &

Company, and the two thousand feet, subsequently, located by Thompson and McGee. The act of congress of 1866, having been complied with, the right of Thompson and McGee, to receive a patent to the whole of said tract, became vested, as the result of said proceedings, upon payment of the purchase money required by law. The mortgages to Conly & Company mentioned, of the original two thousand one hundred feet, were, subsequently, foreclosed, and title to the mortgaged premises passed by sale, under the decree of foreclosure, to Conly & Co., and, by subsequent conveyances, to the Mammoth Gold Mining Company, which, at the time of the issue to it of the patent in question, had no other title, than that which passed under and by virtue of said mortgages and sale. The sale of the original Mammoth ledge of two thousand one hundred feet, with the appurtenances, and the foreclosure, having been made, said application for a patent was allowed to rest without further action until the year 1876. Conly, Tranor and Luther, constituting the firm of Conly & Co., having conveyed to the Mammoth Gold Mining Company, on June 9, 1870, the title to the two thousand one hundred feet, derived under the sale upon the foreclosure of their mortgages, seven years afterward, in 1877, executed another deed to said corporation, whereby they sold, remised and quit-claimed to said corporation all their right, title and interest to the whole four thousand one hundred feet. This deed contained this clause: "A deed having been executed by the first parties to the second party, dated June 9, 1870, conveying two thousand one hundred linear feet of the said Mammoth quartz claim, the *intent of this indenture* is to vest in said second party all the title of said first parties of, in and to the said Mammoth claim." But, neither at that time, nor at any other, did said grantors own any interest in any part of said claim, except the two thousand one hundred feet, purchased under their decree of foreclosure, and they could not convey any interest in the other two thousand feet. The Mammoth company had sold all of its stock to the Plumas Eureka company in the year 1872, and the latter company, which was beneficially owned, and controlled, by the corporation, defendant, had taken possession of said original Mammoth ledge or claim of two thousand one hundred feet, and the ground adjacent thereto, and made improvements thereon; but at that time, took no possession of any other ground, made no efforts to do so, and expended nothing toward the working, or development of the said extension to said ledge, which was not included in any conveyance to them, but was still owned, and possessed by Thompson and his associates, who expended considerable money and labor, at various times, in endeavors to prospect the same, having, especially, in 1875, erected a cabin, and run a tunnel of some one hundred feet in length for the purpose of prospecting said extension, expending in the aggregate about one thousand dollars.

In the fall of 1876, said Thompson proposed to the agents of the defendant, who were, also, at that time, the agents of the Mammoth company, and of the Plumas Eureka company, all of said

corporations being at the time under the same control, that they should unite with him in perfecting the title to the whole of said four thousand one hundred feet of ledge, according to the original locations and survey, and to said tract of two hundred and fifty-two and ninety-five one-hundredths acres, by obtaining a patent therefor, under the application of Thompson and McGee already made, with an agreement for an equitable division thereof, according to their respective rights; but said agents declined the arrangement upon the plea that too much land had been included in the survey, and application; and that the company would not pay five dollars per acre for it. Thompson, who seems to have been the active man, whether, intentionally, or not, was thus put off his guard, and led to suppose, that the defendant's agents would have nothing to do with the survey, and application, of Thompson and McGee. Said agents of the defendant, however, soon after, in the early part of the following year, took measures to secure, secretly, in the name of the Mammoth company, a patent for the whole of said four thousand one hundred feet of ledge, and tract of surface ground, upon the said original survey, and application, of Thompson and McGee, without the permission of, or any notice to, Thompson or McGee, or any publication of their proceedings in any manner. They used and prosecuted Thompson and McGee's survey and application, claiming to be successors in interest to the whole four thousand one hundred feet. In order to make it appear to the land department, that they were the successors in interest of Thompson and McGee, to the whole of the ground, they first obtained the said quit claim deed from Conly, Tranor and Luther, the purchasers under foreclosure, several years after their conveyance of the original two thousand one hundred feet, for the whole four thousand one hundred feet of ledge, under the name and style of the Mammoth ledge, said name having been applied to the whole four thousand one hundred feet by Thompson and McGee, in their application for a patent; whereas, in truth, said purchasers never had title, of any kind, to more than said two thousand one hundred feet included in the mortgages of Thompson and McGee, and purchased by Conly & Co., under the decree of foreclosure, as stated. This quit claim deed *was never recorded*, and all knowledge of its existence was withheld from Thompson and McGee, but was presented to the land office, as a part of the chain of title of the Mammoth company, which claimed the right to a patent, as the successor in interest in the entire tract. The Mammoth Gold Mining Company used and prosecuted the application of Thompson and McGee, and appropriated their survey, acts and work, by procuring a return of the field notes of the original survey, made for Thompson and McGee, by D. D. Brown, the deputy surveyor, which were approved by the surveyor general, for which return they paid Brown the sum of two hundred and fifty dollars, under the caution, and with the express understanding, that he should keep his action secret from Thompson and McGee, which he agreed to do, and did do, until long after

the patent was obtained, and the facts were, otherwise, discovered. The patent was obtained without the knowledge of Thompson and McGee, May 18, 1877, in the unusually short time of less than four months after the commencement of their proceedings on it, and it was recorded in the following June. In December, 1877, Thompson employed men to resume annual work on the extension, without any actual knowledge of the patent, or any suspicion of the action of said corporation, defendant, and its officers. On the twenty-first of December, 1877, the men were ordered from the premises by the superintendent of the Plumas Eureka company, under a notification —not that the Mammoth company had obtained a patent under the application and survey of Thompson and McGee—but that "they," that is to say, the Plumas Eureka company, "had located the ground last summer, and had got a patent for it." This was the first knowledge Thompson and McGee had of any adverse claim of title to the two thousand feet extension in question. Work was resumed in another place during the following January, but no work was done after January. In the fall of the following year, Thompson, having heard that a patent for the ground had been obtained in the name of the Mammoth company, but, still, in entire ignorance of the manner in which it had been obtained, began a series of inquiries into the matter. He first wrote in the month of September, 1878, to the Marysville land office, and, was informed, that the papers had been sent to Washington, and that a patent had been issued to the Mammoth company, but not through that office. Thinking it might have been returned through the Susanville land office, he then wrote to that office, but received assurance to the contrary, and was advised to write for information to the department at Washington. He then began a correspondence with the general land office, at Washington, which, finally, resulted in his obtaining an abstract from the general land office, which, after considerable delay, for which he was not responsible, was received and read by him about Christmas day of the year 1878, which was the first disclosure to him of the main facts constituting the conduct of the defendant. He shortly afterward consulted an attorney, who advised him that a legal fraud had been committed upon his rights.

Meanwhile, the agents, who had been active participants in the procurement of the patent, had ceased their connection with the defendant, and a new agent had been appointed, who was absent from San Francisco, where Thompson resided, and where the defendant had its California office, the defendant being a foreign English corporation. Under the advise of a mutual friend of Thompson, and of the English stockholders of the defendant, Thompson delayed action for the return of Mr. Coulter, the new agent of the defendant, indulging the hope that an adjustment of his claim might be effected without suit. Then began a series of negotiations, and correspondence, which continued without any definite result being reached, until, finally, an assignment having been made of the rights of Thompson and McGee to the plaintiff, this suit was

instituted December 20, 1881, less than five years from the date of the patent, May 18, 1877; less than four years from the date of the ouster of December 21, 1878, and from the first knowledge by Thompson and McGee of the adverse claim set up by defendant; and less than three years from the actual discovery by Thompson and McGee, December 25, 1878, of the facts constituting the acts by means of which the patent was obtained.

The pleas of the defendant, besides a denial of the allegations of the bill, which allegations are, satisfactorily, proved, as above stated, are as follows:

1. *Bona fide* purchase by defendant for value without notice.
2. Abandonment and forfeiture by Thompson and McGee.
3. Adverse possession by the Mammoth company.
4. Statute of limitations.

It seems to me clear, that the complainant has a sufficient cause against the defendant for the enforcement of a constructive trust, unless the respondent, satisfactorily, establishes one of its affirmative defenses.

The civil code, section 2224, declares that "one who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or *other wrongful acts*, is, unless he has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it."

Where one party wrongfully obtains the legal title to land, which, in equity and good conscience, belongs to another, whether he acts in good faith, or otherwise, he will be charged in equity, as a constructive trustee of the equitable owner.

That, I think, is a doctrine established by the following cases: Wilson v. Castro, 31 Cal., 420; Salmon v. Symonds, 30 Cal., 301; Bludworth v. Lake, 33 Cal., 256; Hardy v. Harbin, 4 Sawyer, 549, the latter being a decision of Mr. Justice Field on the circuit.

Under these authorities, unless defendant has satisfactorily established one of its affirmative defenses, complainant is entitled to a decree for a conveyance from the defendant of nine-tenths of the two thousand feet extension of the Mammoth quartz ledge, and of the proper proportion of the surface ground fronting upon, and adjoining the extension included in the patent.

I think the defendant's plea for protection as a *bona fide* purchaser for value, without notice, fails, under the proofs in the case. That plea involves two questions: 1, of payment of value; 2, of notice; both of which must be resolved in favor of the defendant in order to support the plea; but neither of which can be so resolved upon the proofs.

The burden is on the defendant to prove that some new and valuable consideration passed from it, in the purchase of the property, after the equity of Thompson and McGee had accrued. An acknowledgment of payment in a deed is no evidence of such payment as against the owner of a prior equity: Colton v. Seavey, 22 Cal., 497;

Long v. Dollarhide, 24 Cal., 218; Galland v. Jackman, 26 Cal., 80; Boone v. Chiles, 10 Pet., 177, 211.

The testimony in this case fully shows, that the whole beneficial ownership of the original Mammoth mine, as well as of the Plumas Eureka mine, had passed to the corporation defendant as early as 1872; therefore, that there could not, in reason, have been the payment of any new or valuable consideration to the Mammoth company by the Plumas Eureka company, or to the Plumas Eureka company by the defendant after the issue of the patent, which made the Mammoth company the constructive trustee of Thompson and McGee. There is no pretense of affirmative evidence, on the part of the defendant, that any purchase money passed upon the transfer of the patent to the Plumas Eureka company or to the defendant; but, on the contrary, the defendant's own testimony proves, that all of the expense of procuring said patent, in the name of the Mammoth company was paid by the agents of the defendant, out of the proceeds of the Plumas Eureka mine, which was under the ownership and control of the defendant. This fully negatives the defense of *bona fide* purchase for value. But if there were no such evidence, there is nothing to show that value was, in fact, paid, and the defense would fail.

As regards the question of notice, the defense equally fails, for it is well settled, that the knowledge of an agent, in respect to the subject matter of his agency, is the knowledge of the principal; so that, in view of the fact, that the agents of the Mammoth company were also agents of the Plumas Eureka company, and agents of the corporation defendant, in respect to the same subject matter, and performed all of their acts for the immediate benefit of the defendant, and at its expense, it is fully chargeable with knowledge of their acts, and with all equities arising therefrom. Indeed, their acts were the acts of the corporation defendant: May v. Borel, 12 Cal., 91; Bierce v. Red Bluff Hotel Co., 31 Cal., 161; Story on Agency, sec. 140.

The truth, doubtless, is, that these corporations, in substance and fact, were simply using the California corporation through which, to secure the title for the defendant itself, which was a London corporation, and there was a difficulty under the statute in the way of procuring title to itself, directly from the United States. Hence it was so arranged, that the patent should issue to the Mammoth company, which was an American corporation, and entitled to obtain a patent. It is not doubted that that corporation was used as an instrumentality for obtaining the title for the benefit of the defendant in this case. That defense, also, has clearly failed.

As to abandonment, there was, manifestly, none. Abandonment is a voluntary act, and there is no evidence to justify the court in finding that these parties abandoned their rights: Moon v. Rollins, 36 Cal., 333; Richardson v. McNulty, 24 Cal., 345; St. John v. Kidd, 26 Cal., 271-2.

It is not necessary to enlarge on that proposition.

It is said, also, that the claim was forfeited by those parties not working it annually, as required by the statute. That is a matter, I take it, in this case, of not the slightest consequence. There was no evidence that the Mammoth company took up the claim, on the ground, that it had been forfeited, or any other; and until some one did enter, the complainants, under the provisions of the statute, itself, could re-enter and resume work at any time before other rights attached in favor of subsequent locators. So the statute provides: Jupiter M. Co. v. Bodie Con. M. Co., 7 Saw., 98; North Noonday M. Co. v. Orient M. Co., 6 Saw., 301. At all events, these parties, had no title acquired in that way. They obtained the title through Thompson and McGee, upon their own survey and application. They went in and prosecuted the application of Thompson and McGee, as successors in interest to Thompson and McGee, and not as adverse claimants on another independent title. The right which was good enough to enable defendant to obtain a patent for the benefit of the company, was, certainly, good enough for Thompson and McGee to obtain a patent on for themselves. Their right to a patent was perfected under their survey, application, and publication of notice, there being no adverse claims filed. The defendant is, surely, not in a position to say that Thompson and McGee had no title, because that was the very title which the corporation itself has got, and, the only title, on which it relied, or could have relied to procure a patent, as to the extension. It does not lie in defendant's mouth, therefore, to say, that Thompson and McGee had forfeited their claim, and were not entitled to obtain this patent. Defendant did, in fact, obtain it, and did secure the patent, through Thompson and McGee, and through them alone. Since the proofs have come in, on the argument, the respondents really do not make any stand on any of those propositions. They were, substantially, treated, as abandoned, and were really not pressed, or relied on, as they could not well, honestly, have been.

Defendant's counsel now rely, mainly, on adverse possession, and the statute of limitations; and they endeavor to plead the statute of limitations. This is the defense, and only defense, earnestly pressed. This is an equity case, and the statute of limitations, as such, is not a defense in a court of equity of the United States. On the equity side of this court, the only defense is, laches in not pursuing the party's remedy for such time, and under such circumstances, as renders it inequitable to grant the desired relief—that the claim has become stale, so as to render it inequitable to enforce it. A court of equity, in analogy to the statute of limitations, usually, adopts the statute, as a limit to the time for enforcing the claim, unless there are other equitable circumstances, which are deemed sufficient to relieve the party claiming the right from the charge and consequences of laches. In this case the defendant undertakes to set up the statute of limitations, as a statute of limitations, and, as such, a bar to the suit. It is claimed by complainant that the statute is in-

sufficiently pleaded, the defense being alleged in the form authorized by the state code of civil procedure; "that the cause of suit is barred by section 343 of the code of civil procedure of the state of California." That is, simply, and, purely, a plea of the statute of limitations in the form which is recognized by the state practice, but which is not adopted in this court, as the code of civil procedure has no application on the equity side of the court. The defendant has, also, in another form, attempted to set up the facts, which show an adverse possession, for the period prescribed by the statute, in addition to pleading the statute of limitations, in the form prescribed by the code.

Staleness, or laches are not alleged in any other way than as thus indicated. But no formal plea of the statute of limitations or of the special facts is necessary, to raise the defense of laches, neglect, or acquiescence in a court of equity. These defenses are peculiar to courts of equity, and will be enforced in proper cases, wherein the facts appearing call for it, whether they arise upon the bill and pleadings, presented to the court, or upon the whole case, as disclosed by the evidence. The court will often take notice of it, even though the objection is not made by the parties: Pratt v. Cal. Mi. Co., 9 Saw., 363, 365, and cases cited; Badger v. Badger, 2 Wall., 87; Sullivan v. Portland, etc., 94 U. S., 811.

Regarding this defense as properly before the court, and adopting the statute of limitations, by analogy, under which provision of the statute does this case fall? In the first place, the complainant insists on the five years limit. This suit, it is insisted, is, in substance, and in fact, equivalent to an action to recover the premises, as the necessary effect will be to, ultimately, give possession of the premises to the complainant, and it is insisted that this being so, the same limit should be adopted, as in an action at law to recover the property, and a large number of authorities is cited to sustain that proposition. They are as follows: Oakland v. Carpentier, 13 Cal., 540; Elmendorf v. Taylor, 10 Wheaton, 152; Miller's Heirs v. McIntyre, 6 Peters, 61; Manning v. Hayden, 5 Sawyer, 360, 379; Love v. Watkins, 40 Cal., 547, 570; Coulson v. Walton, 9 Peters, 62; Harris v. King, 16 Ark., 122; Ware v. Van Blakkelen, 1 Paige, 100; Walker v. Walker, 16 Serg. & R., 379; Ferris v. Henderson, 12 Pa. St., 54; Paschall v. Hinderer, 28 Ohio St., 568; Perry v. Craig, 3 Mis., 525; McDowell v. Goldsmith, 2 Md. Ch., 370; Field v. Wilson, 6 B. Mon., 479; Murphy v. Blair, 12 Ind., 184; Weaver v. Froman, 6 J. J. Marsh, 213; Varwick v. Edwards, 11 Paige, 289; Baker v. Whiting, 3 Sumner, 475; Boone v. Chiles, 10 Peters, 177.

But, under the view I take, it will not be necessary to decide whether that provision is applicable or not; for it is next claimed by the complainant, and I think correctly, that if the five years limit is not applicable, then the four years limitation is, under the general claim that the limitation shall be four years in all cases not otherwise provided for. In response to this, the respondent asserts, that the case falls under the provision, making the limitation three years,

as being a suit "for relief on the ground of fraud." That the ground of the suit, is, fraud in obtaining the title. Suppose that to be so, the complainant replies, I did not discover the acts constituting the fraud, until within three years after the perpetration of the fraud. In my judgment, the four years limitation applies, if the five years limitation does not. In support of the point made, that the bill is insufficient, and requires amendment, the respondents, inconsistently, in their brief, say, that the theory of the bill is *not fraud*, but that it is well stated in the plaintiff's brief, page 8:

"When one party obtains the legal title to land, which in equity, and good conscience, belongs to another, *whether he acts in good faith or otherwise*, he will be charged in equity as a constructive trustee in favor of the equitable owner."

This, the respondent insists, is the theory of the bill, and such, I also think, is its theory. Respondent objected to certain testimony, which is claimed to show acts of fraud, if acts of fraud there are, on the ground that no fraud has been alleged, and, consequently, no evidence of fraud can be introduced, and no evidence as to the time when the fraud was discovered. The defendant having set up the statute of limitations in its answer, it is insisted that the complainant should have amended his bill, showing when the fraud was discovered. On looking at the bill, I do not find that the acts are charged as fraudulent. There is no charge of fraud in express terms. The acts may, nevertheless, appear to be fraudulent. The facts are stated to show in what manner the title was wrongfully obtained. It is not necessary for me to decide now, whether these acts would constitute a technical fraud, on which a bill could be maintained as such, or not. The acts are not alleged to be fraudulent, in express terms. The simple facts are stated upon the other theory indicated, without characterization, to show that the title had been wrongfully obtained. There was no relation of confidence or trust between these parties, and none alleged or claimed to exist. They were not dealing at all with each other. Defendant made no representations to the complainant on which he relied, unless a refusal to join in procuring the title jointly, and a statement after the patent was procured, that the Plumas Eureka company had obtained the patent on a new location can be so regarded. When the first statement was made, defendants may not have intended to procure the title. But, the last, was after the wrong had been consummated, and evidently designed to mislead and prevent Thompson from ascertaining the real facts—to throw him off the proper line of investigation. No promise was made to, or procured from him. The respondent simply declined to go in with Thompson and obtain the title, and then divide according to their several interests. But defendant, afterward, went, secretly, and, clandestinely, obtained the title to the whole for itself upon Thompson's and McGee's right and application. Undoubtedly, the title was secretly, surreptitiously, and, wrongfully, obtained. There being no relation of trust or confidence between the parties, no false representation, no affirmative acts,

known to Thompson and McGee, performed for the purpose of inducing them not to proceed with their own claim, and the defendant, having, simply, gone, and, quietly, secretly, and surreptitiously appropriated their application and claim, and obtained a patent, it may be that their acts would not constitute a *technical fraud* within the law. I have not looked the question up, and I do not propose to decide it. But whether a technical fraud, or not, it, certainly, comes within the clause of the statute which I have just read that, "one who gains a thing by '*other wrongful acts*' becomes an involuntary trustee." Here is, certainly, a wrongful act. The act of thus appropriating the property of another in a secret manner, without his knowledge, or consent, was, manifestly, and, unquestionably, tortious. Through these wrongful acts, the defendant obtained the complainant's title. If we concede that the bill might be maintained on the theory of fraud, that does not prevent complainant from maintaining his bill on the other ground of suit, as alleged—the wrongful acts of the character shown, by means of which the complainant's title was, surreptitiously, obtained. In my judgment, the case made upon the theory alleged in the bill, and established by the proof, falls within the provision of the section, which says, that four years shall be the limitation, this cause of suit not being otherwise provided for. Such being the limitation, the four years had not expired on December 25, 1878, when Thompson and McGee first learned of these wrongful acts, and, up to that time the wrongful proceedings were concealed by the party performing these tortious acts, and committing the injury. Up to that time, Thompson and McGee had no knowledge, that their rights had been invaded—that they had been thus deprived of their right to obtain a patent. Of course, if we consider the cause of action barred in four years, in equity, the parties could not be chargeable with neglect in enforcing their rights, until they knew they had been violated, and at the time of their ouster, the matter was for the first time brought to their knowledge. That was within four years of the commencement of this suit. They continued in possession, constructively, at least, and on December 21, 1877, were in the actual possession, and occupation, of their claim, by men working upon it. They, therefore, remained in possession of their mining claim until December 21, 1877, when their men were forbidden to work, and compelled to leave the ground, at a time when they were, actually, in possession, and at work. They were informed, at the time, that defendant claimed title under a patent to the Plumas Eureka company, obtained on a new location. These acts constituted an ouster, and it was less than four years before the commencement of the suit. Upon well settled principles of law, the statute does not begin to run against a *cestui que trust* in possession, until the date of his ouster therefrom, no matter whether the trust be express, or implied: Love v. Watkins, 40 Cal., 569; McCauley v. Harvey, 49 Cal., 497; Altschul v. Polack, 55 Cal., 633.

The defendant having, wrongfully, obtained the title of Thompson and McGee, in the manner stated, a trust resulted in their favor, and they were the *cestui que trust* of the two thousand feet extension, in possession of the trust property, and were not ousted until the twenty-first of December, 1877. I think, therefore, that their equities are not cut off by their laches in not pursuing their claim at an earlier date.

Again, in considering this defense, courts of equity will take all the circumstances into consideration. Thompson did not, it is true, immediately commence his correspondence after notice of the adverse claim. He did, however, within a few months. Not many months after he obtained knowledge of the condition of things, through correspondence with the local land offices, and afterward with the general land office, he applied for, and, ultimately, obtained a transcript of the record from Washington, showing that the Mammoth company had obtained a patent on his and McGee's title; that there were false representations made to the land office. When ejected, Thompson, through his men, was informed that the Plumas Eureka company had obtained the title upon a new location of their own. These were false representations, undoubtedly, which tended to put the parties off the proper line of inquiry to find out what the facts were; and they would, naturally, have sought to ascertain what the Plumas Eureka, instead of the Mammoth company, had done. Within a very few months they commenced their inquiries. In December, they were ousted, and, as soon as the real facts were ascertained, they commenced negotiations with defendant for a recovery, or a settlement of their rights. Negotiations continued along for some considerable time. There was correspondence between the London office and the parties here, and there was reason to suppose a compromise might be effected. The negotiations seem to have been friendly, and not of a malicious, or, irritating, character. Thompson and McGee were negotiating, continually, all along pressing their claim. Finally, they informed the defendant that they must either come to some settlement, or they would be compelled to commence proceedings, to avoid the statute of limitations. They, evidently, intended to keep, and supposed they had kept, within the statute all the time, until the suit was commenced.

As I remarked in the opening, since the case was submitted for decision, over a year ago, negotiations have been pending, but have been fruitless. Those facts should be taken into consideration, I think, in determining the question, whether the rights of this complainant have been forfeited by their laches. They have indicated no intention to abandon their claim, but, on the contrary, at all times manifested a purpose to insist upon, and maintain their rights. I am satisfied, if the five years limitation is not the clause applicable, the four years clause is, and that complainant is within the time, taking all the circumstances surrounding the transaction into consideartion. The fact that they did not discover, or have any intimation of the condition of things, until they were ousted in December, 1878,

is highly important, and indicates the earliest time at which the statute could commence to run. Even if the three years limitation be applicable, the statute provides, that the time shall not begin to run "until the discovery of the *facts* constituting the fraud." In this case, the "*facts* constituting the fraud" were not actually discovered till within three years of the commencement of this suit. There was some little delay at first in pursuing such false clue to the facts, as had been given. But here Thompson and McGee were put upon the wrong line of investigation by false statements. They were also, subsequently, encouraged to hope for an amicable settlement by prolonged negotiations. If the suit must be regarded, as seeking "relief on the ground of fraud," the facts disclosed, are such as excuse delay, and under all circumstances, in my judgment, would render it inequitable, to apply the three years limitation. But if applied the time should commence to run at the time of the discovery of the facts constituting the fraud. There must, therefore, be a decree for the complainant in pursuance of the prayer of the bill.

There is one branch, upon which I am not, at present, sufficiently advised, to enable me to make a proper decree—that in reference to the surface ground patented in connection with the mine.

There are two hundred and fifty odd acres of surface ground, very irregular, in shape. There is a mill on some portion of it, erected by the defendant, since obtaining the patent. Whether that mill is on ground which the complainant is entitled to have or not, I am not advised, in the present state of the record. Certainly, if it can be done without wrong to the complainant, the defendant ought to be able to retain that mill. I do not know, from the testimony, where the mill is, in fact, located. The land is so irregular in shape, that, it is not very clear where the lead runs, and where the twenty-one hundred feet end, and the other begins. The land is not in the form of a parallelogram along the line of the lode, within definite, fixed, straight lines, but there are all sorts of angles. Much of it is a long way outside of the lode, and I am not prepared to say what part of the land should pertain to the twenty-one hundred feet, and what part should go with the two thousand feet. If the parties cannot arrange that matter among themselves, before settling the decree, I shall be compelled to refer the matter to the master in order to ascertain and report the exact condition of these matters; the location of the mill; how it is situated, with relation to the two thousand feet, and in relation to the twenty-one hundred feet; how in relation to a line of division drawn directly across the proper point, if there can be a line so drawn; and how much of the land is adjacent to the twenty-one hundred feet. These questions will have to be determined, unless the parties, themselves, can come to some understanding on the subject, and I shall have to refer the matter to the master to ascertain the facts. If necessary, counsel will have to draw an order for that purpose. There will be a decree for the complainant for the conveyance of the portion of the ledge, to which he is entitled, and

such portion of the surface land as may be ascertained to properly belong to the two thousand feet.

There is one other remark, I wish to make. It is alleged that it was not averred in the bill, that this patent was obtained without notice of Thompson and McGee. There is no direct averment of that fact, but there is an averment that it was obtained without the permission of the plaintiff's grantors, and against their will, and it is, clearly, inferrable from the other allegations, that it was without notice, in fact. I think that the testimony objected to is admissible under the allegations of the bill, as showing the circumstances under which the patent was wrongfully obtained, and I think that, of itself, would be sufficient, but it is a mere formal technical objection. It is inferrable from all the allegations of the bill, that it was without notice, and stated to be without permission. I am disposed to think it is not necessary to amend the bill, but if complainants desire to amend, by alleging that the patent was obtained without notice for greater safety, they have leave to do so. The proof must have been the same with, or without the allegation, and the defendant can, in no way, be injured by the amendment. Defendant can amend his bill to correspond with the proof that the patent was obtained without notice to Thompson and McGee. There is authority for this in the case of Neale v. Neales, 9 Wall., 1, 9.

In my judgment, it is not necessary, but if complainant desires to make an amendment, he can do so.

CIRCUIT COURT, DISTRICT OF OREGON.

KOEHLER, RECEIVER, ETC. *v.* BARIN, REGISTER, ETC., ET AL.

October 26, 1885.

JUDICIAL CONTROL OF OFFICIAL ACTION.—As a means of controlling the official action of public officers, in a matter affecting private rights, the writ of injunction is the correlative of the writ of mandamus; and, whenever, in such case, the latter will issue to compel affirmative action, the former may issue to restrain the same; but neither can be used to control or direct official judgment or discretion.

INJUNCTION, WHEN WILL NOT ISSUE TO RESTRAIN REGISTER AND RECEIVER.—An injunction will not issue to restrain the register and receiver from receiving and allowing applications to enter certain lands within their district, although it may appear, in the judgment of the court, that the same belong to the plaintiff by legislative grant, so long as there is room for difference of opinion on the question or its determination involves the exercise of official judgment.

SUIT for an injunction. The opinion states the facts.

E. C. Bronaugh, for the plaintiff.

James F. Watson and *James K. Kelly*, for the defendants.

DEADY, J. This suit is brought by the receiver of the Oregon and California railway company to have the defendants—the register and receiver of the land office at Oregon City—perpetually enjoined from receiving any application to purchase or enter any tract or subdivision of a certain portion of the public land alleged to have been granted to the Oregon Central railway company by the act of May 4, 1870, or otherwise disposing of the same as land of the United States.

The case was heard on a demurrer to the bill for want of equity and for parties defendant.

By the act of May 4, 1870, entitled "an act granting lands to aid in the construction of a railroad and telegraph line from Portland to Astoria and McMinnville in the state of Oregon," it was provided as follows:

Section 1. "For the purpose of aiding in the construction of a railroad and telegraph line from Portland to Astoria, and from a suitable point of junction near Forest Grove to the Yamhill river, near McMinnville, in the state of Oregon, there is hereby granted to the Oregon Central railroad company, now engaged in constructing the said road, and to their successors and assigns, * * * each alternate section of the public lands, not mineral, except coal or iron lands, designated by odd numbers nearest to said road, to the amount of ten alternate sections per mile, on each side thereof, not otherwise disposed of or reserved by valid pre-emption or homestead right at the time of the passage of this act. And in case the quantity of ten full sections per mile cannot be found on each side of said road within the said limits of twenty miles, other lands designated as aforesaid, shall be selected under the direction of the secretary of the interior on either side of any part of said road nearest to, and not more than twenty-five miles from the track of said road to make up said deficiency."

Sec. 2. "The commissioner of the general land office shall cause the lands along the line of said railroad to be surveyed with all convenient speed. And whenever, and as often as, said company shall file with the secretary of the interior maps of the survey and location of twenty or more miles of said road, the said secretary shall cause the said granted lands adjacent to and coterminous with such located sections of said road to be segregated from the public lands; and thereafter the remaining public lands, subject to sale within the limits of said grant, shall be disposed of only to actual settlers, at double the minimum price for said lands."

Sec. 3. "Whenever, and as often as, the said company shall complete and equip twenty or more consecutive miles of the said railroad and telegraph, the secretary of the interior shall cause the same to be examined at the expense of the company, by three commissioners appointed by him; and if they shall report that such completed section is a first-class railroad and telegraph, properly equipped and ready for use, he shall cause patents to be issued to the company for so much of the said granted lands, as shall be adjacent to and coterminous with the said completed sections."

Sec. 6. "The said company shall file with the secretary of the interior its assent to this act within one year from the time of its passage; and the foregoing grant is upon condition that said company shall complete a section of twenty or more miles of said railroad and telegraph within two years, and the entire railroad and telegraph within six years from the same date."

By the act of January 31, 1885, entitled "an act to declare the forfeiture of certain lands granted to aid in the construction of a railroad in Oregon," it is provided as follows:

Sec. 1. "So much of the lands granted by an act of congress, entitled 'an act granting land to aid in the construction of a railroad and telegraph line from Portland to Astoria and McMinnville, in the state of Oregon, approved May 4, 1870, as are adjacent to and coterminous with the uncompleted portions of said road, and not embraced within the limits of said grant for the completed portions of said road, be, and the same are hereby, declared to be forfeited to the United States and restored to the public domain, and made subject to disposal under the general land laws of the United States, as though said grant had never been made."

It appears from the bill that the Oregon Central railway company filed its assent to the act of May 4, 1870, within one year from the passage thereof, and completed a section of twenty miles of said road and telegraph within two years thereafter, and also completed forty-seven and three-fourths miles thereof, namely, from Portland to a point on the Yamhill river near McMinnville, within six years from the passage of said act, all of which was examined and found properly equipped as provided in section 3 of said act; that on January 19, 1885, the plaintiff was duly appointed by this court the receiver of the property of the Oregon & California railway company, and that prior to said appointment said last named company

had succeeded by said purchase to the right and property of said Oregon Central railway company in and to said completed portions of said road and all its right and interest in all of said lands pertaining thereto and is now the owner thereof; that nearly all of the lands within the twenty-five mile limit of the completed portions of said road have been surveyed; that prior to June 21, 1871, said Oregon Central railway company filed with the secretary of the interior a map of the survey and location of its road from Portland to McMinnville and also from a junction near Forest Grove, toward Astoria, in a northwesterly direction, for a distance of twenty miles, and prior to May 9, 1872, filed with said secretary a map of the survey and location of the remainder of said road to Astoria, as shown on the exhibit filed therewith; that thereafter and prior to May 10, 1872, the secretary of the interior segregated and withdrew from the public domain all the land granted to said company, including all of the odd sections on either side of the location of said road, and not more than twenty-five miles distant therefrom; that the completed portion of said road runs from Portland to Forest Grove in a westerly direction, and from the latter place to McMinnville in a southerly direction, the former part being by the line of the land survey about seventeen miles in length, and the latter about twenty miles in length, and all the odd-numbered sections within twenty miles south of said former part are within the twenty-mile limit east of the latter so that by reason of such overlapping, if all such sections within said area were subjected to the terms of said grant, only one-half the quantity of land to which said company became entitled on the south and east side of the completed portions of said road, would or could be obtained within the same; but the fact is that the whole of the odd-numbered sections within said area, together with such sections within an average distance of ten miles west of said latter part of said road are covered by a grant made prior to May 4, 1870, to the Oregon & California company, to aid in the construction of a road from Portland to the southern boundary of the state on the east side of the Wallamet river.

It also appears that on July 8, 1885, the commissioner of the general land office addressed a letter of instruction to the defendants, in which he construes said granting and forfeiting acts so as to deprive the Oregon and California company of a large portion of the land which the plaintiff claims is embraced within the grant for the completed portions of the road.

The letter of the commissioner, after quoting the act of 1885, proceeds as follows:

"A portion of the lands along and lying north of that portion of the constructed road between Portland and Forest Grove, and therefore 'embraced within the limits of said grant for the completed portions of said road' are also 'adjacent to and coterminous with the uncompleted portions of said road' between Forest Grove and Astoria.

"The grant of so much as lies within conflicting limits applies equally to both portions of the definitely located line, thus limiting the volume of the grant for either portion of the road to the extent that the same land fell within the limits of the other portion.

"The question presented by this condition of the grant, is whether the act of January 31, 1885, contemplated the forfeiture of the whole of the original grant of lands 'adjacent to and coterminous with the uncompleted portions of said road,' irrespective of so much as falls within twenty mile limits of the constructed portion, or whether the act intended to reserve from forfeiture all the lands within the latter limits, irrespective of the portion that is adjacent to and coterminous with the uncompleted road. Considering the whole act, it appears to me that congress intended to reserve from forfeiture the lands within granted limits along the whole of the constructed portion of the road. For the present, therefore, the restoration of lands under the act of January 31, 1885, will be limited to the lines shown on the diagram, which is prepared in accordance with the foregoing views." But this diagram, instead of reserving from forfeiture "the lands within granted limits along the whole of the constructed portion of the road," as provided in the letter, designates as forfeited, all the granted land in the eight townships lying wholly or partly within the twenty-mile limit on the west and south of the "constructed" or "completed" road, and constituting the southwest quadrant or fourth of a circle forty miles in diameter and having its centre at Forest Grove; and also all that in the five other townships lying just outside this quadrant and wholly or partly within the twenty-five mile limit.

This is done on the diagram, by dividing the completed road into two lines or parts, forming nearly a right angle with each other, and treating the section between Portland and Forest Grove as one road, and that between the latter place and McMinnville as another, and reserving from forfeiture only the granted lands within the twenty-mile limit on either side of said two sections of the completed road and as said road turns to the south at Forest Grove, at nearly a right angle, the granted lands which lie within the twenty-mile limit on the outside of this curve or angle and within the area of said quadrant, as well as those in the five-mile limit beyond, are treated as forfeited.

The plaintiff claims in his bill that by virtue of the premises the Oregon & California company is now the owner of, and entitled to patents for six hundred and eleven thousand two hundred acres of land, within the said twenty-five-mile limit along the line of said forty-seven and three-fourths miles of completed road, if there was so much subject to said grant, within such area; and alleges that by reason of the overlapping of the prior grant to the Oregon & California company on the south and west thereof, as well as the overlapping therein of the grant to the Oregon Central company itself, not more than three hundred and forty-five thousand six hundred acres of odd-numbered sections can be found in said limits, leaving a de-

ficit of two hundred and sixty-five thousand six hundred acres, to which must be added a number of locations under the pre-emption and homestead laws made prior to the date of said grant; that lists of the greater portion of the lands adjacent to, and coterminous with the completed road were long since filed with the register and receiver at Oregon City, and application made to the secretary of the interior for patents therefor, none of which have been issued; and that in the area constituting the quadrant aforesaid, extended to the twenty-five-mile limit, there are in the odd-numbered sections ninety-one thousand five hundred and forty-five eighty-nine one-hundredths acres of land, of which seventy-three thousand five hundred and seventy eighty-nine one-hundredths acres have been selected by the company, sixty-six thousand nine hundred and twenty-one eighty-nine one-hundredths acres of which are within the twenty-mile limit.

At the passage of the act of 1885, congress had the power, under section 6 of the act of 1870, to forfeit the whole of this grant because the road was not completed to Astoria as well as McMinnville, within the time therein prescribed. The grant was *in præsenti* and vested in the grantee and its assigns the legal title to the odd-numbered sections for twenty miles on either side of the line of said road as fast as the company filed with the secretary of the interior a map and survey of twenty miles of the location of such line, subject to the condition that the whole was constructed within six years: Shulenberg v. Harriman, 21 Wall., 44.

But congress was not bound to do so unjust a thing as to forfeit the whole grant after the completion and acceptance of a considerable portion of the work. And accordingly, we find that, while the act declares that so much of the grant as is "adjacent to, and coterminous with the uncompleted portions of the road," is forfeited, the effect of this language is carefully guarded and restrained by the counter clause—"and not embraced within the limits of said grant, for the completed portions of said road."

The grant made by the act of 1870 was to one company for one road "from Portland to Astoria and McMinnville," as expressed in the title thereof. The junction was fixed near Forest Grove, and for a certain distance beyond that point the grant on the Astoria and McMinnville section necessarily overlapped. But the company could build either section first, and to that which was first completed the grant within the full prescribed limits would in justice apply and belong.

There was no attempt on the part of congress in the act of 1870 to apportion the over-lapping portion of this grant between the two sections of this road, although it was apparent that for some distance the space between them would vary from nothing to less than forty miles. The grant was made without reference to this fact and subject only to the penalty of forfeiture if the whole road was not completed within a given time. The road from Portland to McMinnville was completed in time, but the one to Astoria was not.

And unless congress was going to claim "the pound of flesh" in the forfeiting act, this state of things called for special legislation. Therefore, while it declared the granted lands forfeited along the line of the uncompleted portion of the road—the Astoria section—it qualified this declaration, by saying in effect, so far only as they are not embraced within the limits of the grant to the completed portion of the road—the McMinnville section.

By this means the Astoria section and the grant thereto, for twenty miles beyond Forest Grove, are in effect eliminated from the problem and the grant is saved to the completed road from Portland to McMinnville, the same as if the former had never been mentioned. Therefore, the land embraced in the odd-numbered sections within the limits of the quadrant aforesaid, is, in my judgment, the property of the Oregon & California railway company, and not the public land of the United States.

But so far as the lien or indemnity lands in the second five mile limit are concerned, the act only gave the grantee the right of "selection" to supply an ascertained deficiency in the grant within the twenty-mile limit, and no right attaches to any such lands until the selection is made: Ryan v. Railroad Company, 99 U. S., 382; Grinnell v. Railroad Company, 103 U. S., 742; Kansas P. R. Company v. Atchison, etc., Railroad Company, 112 U. S , 414; St. Paul, etc., Railroad Company v. Winona, etc., Railroad Company, Id., 720.

In the first of these cases, Ryan v. Railroad Company, the question arose under section 2 of the act of July 25, 1866, 14 Stat., 239, granting land in aid of the California & Oregon railway. The language of the grant and the provision concerning the selection of lieu lands within the secondary limit, is in effect the same as in the act under consideration.

Speaking for the court, Mr. Justice Swayne says:

"Under this statute, when the road was located and the maps were made, the right of the company to the odd sections first named became, *ipso facto*, fixed and absolute. With respect to the 'lieu lands,' as they are called, the right was only a float, and attached to no specific tracts until the selection was actually made in the manner prescribed." See also St. Paul Railroad v. Winona Railroad, 112 U. S., 732, in which Mr. Justice Miller, in considering this subject, says:

"It is true that in some cases the statute requires the land department to withdraw the lands within these secondary limits from market, and in others the offices do so voluntarily. This, however, is to give the company a reasonable time to ascertain their deficiencies and make their selections. It by no means implies a vested right in said company, inconsistent with the right of the government to sell, or of any other company to select, which has the same right of selection within those limits. Each company having this right of selection in such case, and having no other right, is bound to exercise that right with reasonable diligence; and when it is exercised in accordance with the statute, it becomes entitled to the

land so selected. The unascertained float then becomes a vested right to an identified tract of land."

Assuming then, that the legal title to the land in the odd-numbered sections in this quadrant is in the company, but as to those in the further five-mile limit it only has the right of selection for the purpose of making up the deficiency in the twenty-mile limit, is the receiver entitled to the relief sought in this suit?

As a means of controlling the action of public officers in a matter affecting private rights, the writ of injunction is considered the correlative of the writ of mandamus; and whenever, in such case, the latter will issue to compel affirmative official action, the former may issue to restrain such action: Gaines v. Thompson, 7 Wall., 352; Board, etc. v. McComb, 92 U. S., 541.

In the leading case of Kendall v. U. S., 12 Pet., 524, it was held that a mandamus would issue to compel the postmaster general to perform a mere ministerial duty in which the relator had an interest, and which did not involve the exercise of executive judgment or discretion on the part of that officer. In the latter case of Gaines v. Thompson, 7 Wall., 347, which was a suit to enjoin the secretary of the interior and the commissioner of the general land office from canceling an entry under which the plaintiff claimed an interest in certain lands, the subject was thoroughly and ably re-examined by Mr. Justice Miller, and the conclusion reached, "that an officer to whom public duties are confided by law, is not subject to the control of the courts in the exercise of the judgment and discretion which the law reposes in him as a part of his official functions." And that, "however, the courts may, in ascertaining the rights of parties in suits properly before them, pass upon the legality of their acts, after the matter has once passed beyond their control, there exists no power in the courts, by any of its processes, to act upon the officer, so as to interfere with the exercise of that judgment while the matter is properly before him for action. The reason for this is, that the law reposes this discretion in him for that occasion, and not in the courts."

He also quoted with approval Mr. Chief Justice Chase's definition of a ministerial duty, in Mississippi v. Johnson, 4 Wall., 498, concerning which an officer may be directed or restrained by the courts—"A ministerial duty, the performance of which may in proper cases be required of the head of a department by judicial process, is one in respect to which nothing is left to discretion. It is a simple, definite duty, arising under circumstances admitted or proved to exist and imposed by law."

Following this case, the court, in Litchfield v. Register and Receiver, 9 Wall., 575, refused to enjoin the defendants from receiving and acting on applications under the pre-emption law by settlers on certain lands within the district for which they were respectively the register and receiver.

In delivering the opinion of the court, Mr. Justice Miller said: "The very first duty which the register is called on to perform,

when an application is made to him to enter a tract of land, is to ascertain whether it is subject to entry. This depends upon a variety of circumstances. Has there been a proclamation offering it for sale? Has it been reserved by an action of congress or of the proper department? Has it been granted by an act of congress, or has it been sold already? These are all questions for him to decide, and they require the exercise of judgment and discretion."

Notwithstanding my conclusion that this land belongs to the company under the acts of 1870 and 1885, and that its claim thereto will ultimately be maintained in the courts against any one who attempts to acquire the title to it under the pre-emption or other laws of the United States for the disposition of the public lands, still the matter is not so plain that there is no room for difference of opinion, and the exercise of judgment in the premises on the part of the defendants, or those authorized to direct them in the discharge of their duties.

For instance, it may be claimed with some show of reason, that the grant was made to aid in the construction of a road from Portland to Astoria, and another from Forest Grove to McMinnville, and, therefore, the land in the quadrant aforesaid is no part of the grant to the latter, but is simply adjacent to and coterminous with the uncompleted portion of the former; or that on the face of the act of 1870, there being an overlapping grant for some twenty miles to the northwest of Forest Grove to the Astoria and McMinnville branches or sections of a road from Portland to said last mentioned places, the act should be construed so as to divide the grant between them, whereby the sections falling to the Astoria branch being adjacent to and coterminous with the uncompleted portion thereof, are forfeited by the act of 1885.

It is not a sufficient answer to this, that by far the more reasonable and just construction of the statutes is the one first indicated in this opinion. So long as there is fairly room for the exercise of their judgment in the premises the action of the defendants cannot be constrained by the courts.

This conclusion makes it unnecessary to consider the objection of want of parties defendants to the bill. In Litchfield v. Register and Receiver, *supra*, it appeared that persons had already settled on the land in question under the pre-emption law, and were about to "prove up" thereon before the defendants. The court held that these persons were necessary parties to the bill. But in this case there is no allegation that any one has yet settled on the land or taken any steps to acquire an interest therein adversely to the company.

The demurrer to the bill must be sustained, and it is so ordered.

SUPREME COURT OF NEVADA.

STATE v. GRAY.

Filed November 4, 1885.

MURDER—CHANGE OF VENUE—PREJUDICE AGAINST DEFENDANT.—Where a motion for a change of venue, in a prosecution for murder, is made, on the ground of prejudice against the defendant in the county where the indictment was pending, which would prevent him from having a fair and impartial trial, the court may deny the motion, until it can be shown by an examination of a sufficient number of jurors whether a fair and impartial jury can be obtained or not.

THE SAME—CONTINUANCE OF TRIAL—ABSENCE OF WITNESS.—In such case, a refusal to continue the trial, on account of the absence of witnesses for the defense, is not error, if the officer, in whose hands the subpœnas against them had been placed for service, was ignorant of their place of residence, and nothing appeared from which the court might infer that their attendance could be procured at any subsequent term of the court.

THE SAME—CHALLENGE TO JURORS—TRIAL OF—ACTUAL AND IMPLIED BIAS.—A challenge to a panel of jurors, summoned upon an open venire, on the ground of bias on the part of the officer summoning, should show upon its face whether it was taken for implied or actual bias. If for implied bias, it is the duty of the court to decide upon the objection; if for actual bias, triers should be appointed by the court for that purpose; if the defendant does not ask for the appointment of triers, but submits evidence in support of the challenge to the court, he waives his right to an examination by triers. In such case, the decision of the court is final, and not the subject of exception, and cannot be reviewed on appeal.

THE SAME—MURDER COMMITTED DURING PERPETRATION OF ROBBERY.—The killing of a human being, although unintentional, when perpetrated by a person engaged in the commission of robbery, is murder in the first degree, under section 2,323 and 2,327 of the compiled laws. And the court may instruct the jury that if they find the murder was so committed, they must find the defendant guilty of murder in the first degree.

THE SAME—ABANDONMENT OF FELONIOUS INTENT.—On the trial the defendant testified "that on the night of the homicide, he entered the store of S. & P., with the intention of committing robbery by intimidation; that he carried a shot-gun with both barrels loaded, but uncocked, that he requested deceased to keep still, but that when he saw the movements of S., he abandoned all intention of committing any robbery or other felony, and was endeavoring in good faith to leave the premises without committing any felony whatever; that in so doing the gun was jerked from him, and accidentally discharged; thereby deceased was killed and defendant fled; that immediately before the gun was seized by deceased, defendant cried out, 'Hold on, and I will go.'" *Held*, not to show an abandonment by defendant of his felonious attempt.

SEPARATION OF JURY—NEW TRIAL—A separation of the jury, during the trial of such case, will not warrant a new trial, unless it appears that the defendant was injured thereby.

RECOMMENDATION TO MERCY.—The refusal of the court to strike from the verdict a recommendation to mercy is not error.

APPEAL from a judgment of the district court of the fourth judicial district, Humboldt county, upon a verdict convicting the defendant of murder. The opinion states the facts.

J. H. MacMillan and *J. A. Hannah*, for the appellant.

W. H. Davenport, attorney general, S. J. Bonnifield, district attorney, M. S. Bonnifield and *H. F. Bartine*, for the respondent.

BELKNAP, C. J. Defendant appeals from a judgment of conviction of murder of the first degree upon numerous exceptions.

First—Defendant applied for a change of venue on the ground of prejudice existing against him in the county where the indictment was pending, which would prevent him from having a fair and impartial trial. The application was based upon affidavits tending to establish the fact alleged, and resisted by counter-affidavits. It is unnecessary to consider the contents of the affidavits. The district court overruled the motion for the time being, until it could be

shown by an examination of a sufficient number of jurors that a fair and impartial jury could not be obtained. After examining eighty-one persons a jury was impanelled. The statute authorizing a change of venue in criminal cases provides, that before granting the order, the court shall be satisfied that the representations of the moving party are true. The question whether a fair and impartial jury could be obtained depended largely upon the opinions of witnesses. Opinions differed widely, and the court adopted a very satisfactory test to ascertain the fact. The practice pursued was approved in State v. Millain, 3 Nev., 433, and by the supreme court of California, in People v. Plummer, 9 Cal., 298, and in People v. Mahoney, 18 Cal., 180. In this connection it is said that defendant was entitled not only to an impartial jury but to an impartial trial, and it is contended that the possibility of an impartial trial was precluded by the existence of a prejudice which pervaded the community. An affidavit against the motion denies the existence of such a feeling of hostility as would prevent an impartial trial of the same, and no fact has been presented tending to show prejudice in this respect to the defendant upon the occasion of the trial.

Second—Defendant moved the court for a continuance of the trial of the cause upon the ground of the absence of witnesses, and in support thereof, relied upon his affidavit setting forth that on the twenty-third day of February, 1885, subpœnas were issued commanding Joshua Winthrop, W. J. Thompson and John Doe, foreman of Reconzone sheep ranch, to be present as witnesses at the trial to take place on the seventeenth day of March succeeding, to testify in his behalf; that the sheriff of the county, as appeared by his return, had been unable to find any of these persons, but it is nowhere suggested that the sheriff was not diligent in endeavoring to serve the process which had been placed in his hands. The affidavit fails to state whether the officer was informed of the place of residence of any of them, save that they had told affiant that they lived in Humboldt county, or where they could be found, or where any information concerning their whereabouts could be obtained. Nor were any facts shown from which the court could predicate a belief that their attendance could be procured at any subsequent term of the court. The order of the district court denying the motion for a continuance was correct in respect to the absence of the persons named, because of these defects. Another witness, named Charles Barnard, had been subpœnaed, but was not present at the trial. The district attorney stated in open court that Barnard was at Lewis in Lander county, and thereupon, the court stated "that if defendant desired, an attachment would issue for Barnard. Defendant did not at any time apply for such attachment, but declined to proceed until attendance of witnesses was assured." Under these circumstances defendant cannot now complain of the absence of this witness: People *v.* Weaver, 47 Cal., 106.

Third—A challenge in writing was interposed in behalf of defendant to a panel of additional jurors summoned upon an open venire

directed to the sheriff, upon the ground of "a material departure from the form prescribed by the statute in respect to the drawing and return of said jury." The challenge specifies the particular grounds upon which it is rested, none of which are now urged except this: "That the deputy sheriff who summoned forty of said jurors is biased against the defendant." The statute authorizes a challenge to the panel founded on a material departure from the forms prescribed by the statute in respect to the drawing and return of the jury, or on the intentional omission of the sheriff to summon one or more of the jurors drawn: Section 1,947; and, also, upon bias of the officer summoning jurors upon an open venire: Section 1,954. The challenge was imperfectly taken. The separate causes of challenge should have been separately taken, and the challenge should have shown upon its face whether it was taken for implied or actual bias. If for implied bias, it was the duty of the court to decide upon the objection; if for actual bias triers should have been appointed by the court for that purpose: Section 1,968. The challenge was overruled, and it is now urged that the question of bias should have been determined by triers and not by the court. The exception was not placed upon that ground in the district court. Regarding the challenge as one for actual bias it was competent for the court, by consent of the parties, to act as trier.

Defendant not only failed to ask for the appointment of triers, but submitted evidence in support of the challenge to the court. This operated as a waiver of an examination by triers. It was decided in People v. Mather, 4 Wend., 230, that "when the facts on which a challenge rests are disputed, the proper course is to submit the question to triers; but if neither of the parties ask for triers to settle the issue of fact, and submit their evidence to the judge, and take his determination thereon, they cannot afterwards object to his competence to decide that issue. The production of evidence to the judge, without asking for triers, will be considered as the substitution of him in the place of triers; and his decision will be treated in like manner as would be the decision of triers:" Com. v. Gross, 1 Ashm., 286; People v. Rathburn, 21 Wend., 542; Stout v. The People, 4 Park. C. R., 134; O'Brien v. The People, 36 N. Y., 279; Schoeffler v. State, 3 Wis., 717; Barb. Crim. Law., 355. The decision of the triers—and in this case by the court as trier—is final and not the subject of exception and cannot be reviewed upon appeal: Section 2,046, Com. L.; People v. Cotta, 49 Cal., 166; People v. Vasquez, Id., 560; People v. Taing, 53 Cal., 602.

If the challenge be considered as made for implied bias it was properly overruled, because it does not set forth any ground upon which a challenge for implied bias may be made: Section 1,964, Comp. L. The record fails to show that the challenge was denied. This omission cannot be construed as a confession of the challenge. An appellant must affirmatively show error.

Fourth—Upon the trial of the cause defendant testified "that on the night of the homicide, between eight and nine o'clock in the

evening, he entered the store building of Scott & Powell, where said homicide was committed, with the intention of committing robbery by intimidation; that he carried a shotgun with both barrels loaded with bird-shot, but uncocked; that he had barley sacks upon his feet, and a barley sack pulled over his head, loose, without being fastened, with small holes cut in front through which to look; that he requested deceased to keep still, but that when he saw the movements of Scott he abandoned all intention of committing any robbery or other felony, and was endeavoring in good faith to leave the premises without committing any felony whatever; that in so doing the barley sack on one of his feet caught on something at the end of the counter, the mask became displaced so that he could not see; the gun was jerked from defendant, and in being so pulled away from defendant, was discharged accidentally, and without any voluntary act of defendant; deceased was thereby killed and defendant fled; that immediately before the gun was seized by deceased, defendant cried out, 'Hold on, and I will go.' * * * "

The court refused to instruct the jury upon the theory of an abandonment by defendant of his felonious attempt and its ruling in this respect is assigned as error. The doctrine of abandonment of an attempt is thus stated in Whart. Cr. L., section 187: "If an attempt be voluntarily and freely abandoned before the act is put in process of final execution, there being no outside cause prompting such abandonment, then this is a defense; but it is otherwise when the process of execution is in such a condition that it proceeds in its natural course, without the attemptor's agency, until it either succeeds or miscarries. In such a case, no abandonment of the attempt, and no withdrawal from its superintendence, can screen the guilty party from its results. * * * It should be remembered, also, that if such abandonment is caused by fear of detection it is no defense, if the attempt progress sufficiently towards execution to be *per se* indictable before such abandonment. Thus, if a thief, when moving his hand towards a pocket, desists on seeing a detective, the offense is made out. To the same effect, perhaps, may be cited two American decisions, in which attempts at rape, abandoned before consummation, were held indictable. It is true that it may be observed that in these cases the offense of felonious assault was complete, prior to the period of abandonment. More exactly illustrative of the principle is an English case tried before Chief Baron Pollock, in which it appeared that the defendant having lighted a lucifer match to set fire to a stack, desisted in discovering that he was watched. It was held, and properly, that this abandonment of purpose was no defense. It must also be remembered that if an attempt—*e. g.* an assault—is frustrated by force, such frustration is no defense."

The rule as thus declared fully meets the case made by the defendant and sustains the action of the district court in refusing the instructions. See also, State v. Elick, 7 Jones, N. C., 68; Lewis v.

State, 35 Ala., 380; Regina v. McCann, 28 Up. Can., Q. B., 516; State v. Blair, 13 Rich., 97.

Fifth—The court declined to give a series of instructions presented in behalf of defendant, based upon the position that the killing of the deceased was not murder of the first degree unless committed with a deliberate and premeditated design to kill.

The statute, section 2,323, Comp. L., provides that "all murder which shall be perpetrated by means of poison, or lying in wait, torture, or any other kind of willfull, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery or burglary, shall be deemed murder of the first degree." In considering a similar statute of the state of New Hampshire, the supreme judicial court of that state well said: "The legislature did not intend that this species of killing should be murder of the first degree only when accompanied by a deliberate, premeditated, design to kill; for if such a design had been a necessary ingredient to constitute murder of the first degree, the latter part of section first would not have been added. If killing in the perpetration of a robbery, was murder of the first degree only when accompanied with such a design, it was already included under the words 'other deliberate and premeditated killing,' and nothing further need have been said about it": State v. Pike, 49 N. H., 403.

In the instructions upon this branch of the case given at the request of the state, the word "kill" is employed instead of the statutory word "murder,"—the statute declaring not that every homicide committed in the perpetration or attempt to perpetrate arson, rape, robbery or burglarly, shall be murder of the first degree, but that any murder so committed shall be murder of the first degree. The following is one of the class of instructions upon this point:

"If you find from the evidence, beyond a reasonable doubt, that the defendant, on the twenty-fourth day of December, 1884, or thereabouts, in Humboldt county, state of Nevada, did then and there kill R. H. Scott, named in the indictment, by shooting him with a shot-gun, and likewise find that such killing was done in perpetrating, or attempting to perpetrate, a robbery upon said Scott, by the defendant, then your verdict should be guilty of murder of the first degree."

Section 2,327, Com. L., provides, that when "involuntary killing shall happen in the commission of an unlawful act, which, in its consequences naturally tends to destroy the life of a human being, or is committed in the prosecution of a felonious attempt, the offense shall be deemed and adjudged to be murder." The killing of a human being, although unintentional, is thus made murder, when perpetrated by a person engaged in the commission of a felony. The defendant was so engaged as is shown by his own testimony. The words "kill" and "murder" were under these circumstances of like signification and effect, and either could properly have been used.

Sixth—The court instructed the jury as follows: "There are certain kinds of murder which carry with them conclusive evidence of premeditation. These the legislature has enumerated in the statute, and has taken upon itself the responsibility of saying that they shall be deemed murder of the first degree. One of these classes of murder is where it is committed in the perpetration or attempt to perpetrate a robbery. When a jury finds a murder has thus been committed, it has no option but to find the perpetrator thereof guilty of murder of the first degree." The instruction is a copy of a portion of an instruction to be found in the report of the case of People v. Sanchez, 24 Cal., 29. The complete instruction as given in that case, was used in explaining the degrees of murder and the tests by which they could be ascertained. It was highly commended by the supreme court of California in People v. Nichol, 34 Cal., 212, but neither case was one of murder committed in the perpetration of a felony. These decisions are not authority, therefore, in this case. It is claimed that the concluding sentence of the instruction takes from the jury their right to fix the degree of murder. It correctly defines the degree which the law attaches to murder committed in an attempt to perpetrate a robbery, and tells the jury, in effect, that if the facts come within the law as stated, they have no option but to return a verdict of guilty of murder of the first degree. It is a statement to the jury of the legal effect of facts, but does not direct them to find in any particular way. The right to determine the degree of murder is by statute, committed to the jury, but they are not deprived of the right by being instructed in their duty under the law. It cannot be said, as matter of law, that because the jury may fix the degree of murder, they may find any degree they please, although they have the power to do so.

The instruction was given in connection with others which expressly declared the right and power of the jury to ascertain by their verdict, whether the offense was murder of the first or second degree, and if a reasonable doubt existed in the minds of the jurors whether defendant was guilty of murder of the first degree or second degree, he should not be found guilty of any greater offense than murder of the second degree, and the instructions contained a form for a verdict of murder of the second degree.

Seventh—At the conclusion of the evidence and before the argument, the court took a necessary recess of ten minutes for the purpose of allowing the jury to leave the room. During their absence from the court room they were, by direction of the court, in charge of the sheriff and his deputy. Affidavits in behalf of the state show that there was no communication with any member of the jury upon the subject of the case, nor any communication whatever other than innocent passing remarks directed at jurors by persons in the hall through which the jury passed. Upon taking the recess they were not admonished "not to converse among themselves, or with any one else, on any subject connected with the trial, or to form or express any opinion thereon until the cause is finally submitted to

them," as provided by section 2,005, Comp. L., but it is clearly shown that the defendant was not injured thereby: People v. Colmen, 23 Cal., 632.

Eighth—The court refused to strike out of the verdict a recommendation to mercy. The recommendation constituted no proper part of the verdict, but the ruling could not have prejudiced the defendant. Further exceptions are found in the record, but they have not been argued here and the rulings upon which they are taken are manifestly correct, and discussion thereon is unnecessary.

We have given a careful consideration to the case and cannot discover that the record contains any error, or that any injustice has been done the defendant.

The judgment and order denying a new trial must be affirmed, and the district court directed to fix a day for carrying its sentence into execution.

It is so ordered.

SUPREME COURT OF OREGON.

MACKEY ET AL. v. OLSEN.

Filed October 21, 1885.

SALE OF STANDING TIMBER—CONTRACT FOR—MEASURE OF DAMAGES.—In an action to recover damages for breach of a contract for the sale of certain standing timber, the measure of damages is the difference between the contract price and the market value of the timber standing at the time the cause of action arose.

APPEAL from Benton county. The opinion states the facts.

John Burnett and *John Kelsay*, for the appellant.

R. S. Strahan and *J. R. Baldwin*, for the respondents.

LORD, J. This is an action for damages based upon the breach of a written contract for the sale of standing timber, in which it is alleged, as the essential part of such contract, "that in consideration of one-half cent per foot running measure, the party of the first part agrees to sell all the timber on his land near Newport, that may be found suitable for piling, or railroad ties, and give the right of way to said timber to the parties of the second part. And the parties of the second part agree to pay to the parties of the first part one-half cent per foot running measure, for all timber on said land suitable for said road, ties or piling, payments to be made on the delivery receipt and payment of the railroad company or other purchasers." It is further alleged that the market value of the timber is six cents per foot. In his answer the defendant denies this allegation and alleges that the market value was not greater than the contract price, etc. Issue being joined, a trial was had which resulted in a verdict for the plaintiffs. The defendant appeals and assigns among other grounds of error, as appears by the bill of exceptions, that the court erred in allowing the plaintiffs to

prove the costs of constructing a road to get the standing timber mentioned in the complaint, for the reason, principally that the measure of damages applicable to the case is the difference between the contract price and the market value of the timber standing. The defendant claims that the plaintiffs have no more right to make him pay for making the road to his timber, than if they had gotten all the timber for which the contract provided and then sued him for the cost of making the road to get it. Now it will be admitted that if the contract had been fully performed and completed, the road must have been left on the land and no charge could be made for the expenses of constructing it. By their verdict for damages, plaintiffs have got all the timber for which the contract provided, and the road is left on the land the same as if the contract had been performed, as indicated by the issue and the instructions of the court, the difference between the contract price and the market value of the timber standing at the time the cause at action arose was the measure of damages applicable to the case, it was error, therefore, to allow evidence to show the expense of constructing this road. The amount of this expense was sixty-five dollars. And we think the admission of this evidence worked an injury to the defendant. But, as we are unable by the record to segregate the amount from the verdict, we have concluded, that if the plaintiffs will remit this sum of sixty-five dollars, the judgment will be affirmed for the balance, otherwise a new trial must be ordered.

DAVIS v. WAIT.

Filed October 21, 1885.

BILL OF EXCHANGE—PARTIAL FAILURE OF CONSIDERATION—INDORSEE WITH NOTICE.—Partial failure of consideration of a bill of exchange may be set up to an action on the bill, against an indorsee, before maturity, who had notice thereof. In such action the defendant may recoup his damages, though they be unliquidated.

JOINDER OF ISSUE ON FACTS DEFECTIVELY ALLEGED, is a waiver of the defect.

APPEAL from Marion county. Action on a bill of exchange endorsed before maturity, drawn on the defendant July 23, 1883, at nine months, by Fish Bros. of Racine, Wisconsin, and accepted by defendant. Defense, partial failure of consideration, known to the plaintiff when he took the draft, pleaded as follows: "That the plaintiff before he claims to have received said draft by indorsement, had notice and knowledge of the terms of the contract and agreement between Fish Bros. & Co. and the defendant, and of its violation by the former in the respect hereinbefore set out." This allegation was denied in the reply.

The court instructed the jury that "the plaintiff having notice of said claim of damages and defects before he purchased the bill, if he did purchase it, would not affect his right to recover, provided he purchased it before it became due. There being no allegation

of fraud in obtaining the bill, the question of notice is not material, provided the bill was purchased for value, in the usual course of business, before it became due." Verdict for plaintiff.

William M. Ramsey, for the appellant.

Mark A. Fullerton, for the respondent.

WALDO, C. J. The answer set up a good defense of notice and the court erred in the instruction which cut it off. Partial failure of consideration of a bill of exchange may be set up to an action on the bill, and the defendant may recoup his damages, though they be unliquidated: Wethers v. Green, 9 How., 224; Stacy v. Kemp., 97 Mass., 166; Wyckoff v. Runyon, 4 Vroom, 107. If an indorsee take a bill with notice of the failure of consideration, his right to recover cannot be superior to that of his indorser: Herrick v. Carman, 12 John., 159; 1 Par. on Bills and Notes, 258. Counsel for the plaintiff argued, however, that, conceding error in the instruction, the defendant could not take advantage of it, because he had not properly alleged notice in his answer, in this, that he did not allege that the draft in suit arose out of the transaction on which the defendant founded his defense. The pleading is defective in the particular alleged, but the plaintiff waived the defect by taking issue on the facts alleged, as is shown in White v. Spencer, 14 N. Y., 247, and Bank of Illinois v. Brady, 3 McL., 268. The judgment must be reversed, and a new trial ordered.

Judgment reversed.

SUPREME COURT OF CALIFORNIA.

No. 8,920.

ALPERS v. KNIGHT.

In Bank. Filed October 31, 1885.

SPECIFIC PERFORMANCE—ALLEGATION OF PERFORMANCE.—In an action for the specific performance of a contract for the sale of land, allegations of performance by the vendee held sufficient.

THE SAME—EQUITABLE TITLE PASSES WITH DEED FROM VENDEE.—A deed from the vendee, under a contract for the sale of land, transfers the equitable title to the grantee, and gives him the right to demand a conveyance from the vendor, or from a subsequent purchaser, with notice.

APPEAL from a judgment of the superior court of the city and county of San Francisco, entered in favor of the defendant.

J. G. Severance, for the appellant.

Preston & McPike, for the respondent.

THE COURT. The defendant's demurrer to the complaint was sustained and final judgment passed in the superior court in favor of defendant. From this judgment plaintiff has appealed.

As we understand the agreement set forth in the complaint, it was agreed by Frederick G. Smyth, that Joseph L. Reed should be entitled to conveyance of one-third of all the lands devised to said Smyth "upon the full and complete performance of the stipulations," by Reed and wife, agreed and covenanted to be done and performed, and when and after all claims, costs and debts against the estate of Peter S. McNeil should be paid. The complaint alleges that "all claims against, debts owing and payable by, and costs and expenses of every kind and character in any manner incurred in and about the said estate of Peter S. McNeil, deceased, and in the administrator thereof, were fully paid and discharged by the said administration of said estate, *out of the moneys alone* belonging to said estate and in the hands of said administrator, who, thereupon, filed his final account, etc." Further, that all the stipulations covenanted and agreed to be performed by Joseph L. Reed, and Catherine C., his wife, in the agreement between them and Smyth, were by them fully and completely performed. The complaint also avers that four hundred and twenty-five dollars, paid in conformity to said agreement was less than one-third of a balance of the sum received by Smyth from the special administrator, Mayer.

The complaint also shows that defendant had notice of the agreement above referred to when he took his deed from Smyth. The subsequent deed from Joseph L. Reed to plaintiff transferred the equity of the former, and gave the latter the right to demand a conveyance from defendant.

Judgment reversed and cause remanded with direction to the court below to overrule the defendant's demurrer.

No. 8,415.

GRANGERS BUSINESS ASSOCIATION OF CALIFORNIA *v.* CLARKE.

Department One. Filed October 31, 1885.

CORPORATIONS—MORTGAGE TO—ULTRA VIRES—MORTGAGOR CANNOT QUESTION CORPORATE EXISTENCE.—In an action by a corporation to foreclose a mortgage, given to secure a loan to the defendant, the latter cannot question the legality of plaintiff's corporate existence, or its power to enter into the contract.

APPEAL from an order of the superior court of Alameda county, entered in favor of the plaintiff. The opinion states the facts.

M. Mullany, for the appellant.

A. W. Thompson, for the respondent.

ROSS, J. The plaintiff loaned the defendant a certain sum of money in consideration of which defendant executed to the plaintiff his certain promissory note together with a mortgage to secure its payment. And this action by the plaintiff to foreclose the mortgage is resisted by defendant, upon the alleged grounds, (1) of irregularities in the organization of the plaintiff corporation, and, (2) of the want of power on plaintiff's part to enter into the contract.

Upon established principles of equity, appellant's mouth is closed in respect to both points: Sedgwick on Stat. and Const. Law, 73; Bigelow on Estoppel, 424; Morawitz Priv. Corp. sec. 100.

Order affirmed.

MCKEE, J,. and MCKINSTRY, J., concurred.

WEST COAST REPORTER.

WHOLE No. 99. NOVEMBER 19, 1885. VOL. VIII. No. 3.

CIRCUIT COURT, DISTRICT OF CALIFORNIA.

UNITED NICKEL COMPANY *v.* CALIFORNIA ELECTRICAL WORKS.

October 31, 1885.

PATENT No. 93,157 FOR NICKEL PLATING INFRINGED.—The defendant has infringed the first and fourth claims of Adams' patent No. 93,157 for nickel plating.

DR. BOETTGER'S PROCESS is not an anticipation of Adams' invention.

ADAMS' INVENTION CONSISTS OF A DISCOVERY of the conditions necessary to make nickel plating a practical art, and the process by which it is made available in the practical uses of life.

PERSUASIVE EVIDENCE OF NOVELTY.—Where the value of nickel plating had long been known, and a want of it long recognized in the practical affairs of life, without having been supplied, the fact, that, immediately, after a process for nickel plating had been brought to the attention of the world, it was extensively adopted in the arts, and went into widespread use, is, of itself, persuasive evidence of the novelty of the process.

ESTOPPEL BY LICENSE.—Where a patent contains several claims, each claim, substantially, covers a distinct invention, and if the patentee grants a license to use the invention covered by one of the claims, only, he is not estopped thereby from recovering for an infringement of the invention covered by another, and different claim, in the same patent, even though the infringement be accomplished by aid of the use of the invention to which the license extends. The license only protects the licensee in the use of the particular invention covered by the license.

IN EQUITY. The opinion states the facts.

Scrivner & Boone, for the complainant.

Wright & Cormac and *Wilson & Wilson*, for the defendant.

SAWYER, CIRCUIT JUDGE, rendering an oral decision:

In this case it is objected on the part of the defendant, that the complainant fails to make out a case in three particulars:

First.—"That the complainant is estopped from enforcing its right of action, if any such existed, by a course of conduct which amounted to an implied license to the defendant to pursue the work for which it has been sued."

Second.—"That the complainant has not proved with reasonable certainty its allegation of infringement by defendant."

Third.—"That the matter covered by the letters patent was not novel, or useful, at the time of its alleged invention."

I have carefully considered the testimony, and am satisfied, that the complainant has proved the infringement, as alleged; and that both the first and fourth claims have been infringed. I, therefore, decide that point against the defendant.

Third, with reference to novelty and usefulness: That the invention is useful does not admit of doubt. As to its novelty, that

is a question, that has been litigated by the ablest patent lawyers, before the most experienced judges in patent laws, in the Union, for the last fifteen years, in case after case. In every instance, so far brought to my attention, the patent has been sustained upon the point of novelty. Of course, those decisions are not binding on this court as to the facts, in this case, but they indicate the views of other courts upon similar states of facts, which have been, repeatedly, fully presented and considered. This case, however, must be decided upon the testimony introduced here. There is an effort, and the only substantial effort, made upon the question of novelty, to show that one Dr. Boettger, somewhere before 1843, made the invention, and described how nickel plating could be done, and that his process was described in a book published as early as 1843, and in subsequent editions, though no witness had seen the book, or knew of its date except from hearsay, and the date inscribed on the book, it being a German publication, until some time in 1869, and the date of this patent is August 4, 1869. Some experiments have been made by scientific gentlemen, to show that it is possible to nickel plate by the use of Dr. Boettger's solution, and proceeding in accordance with his directions. Dr. Bottger's process could not well have been overlooked, in the trial of former cases, considering the character of the publication in which it was found, and the number and ability of the counsel, and of the judges, who have constantly dealt with the question of novelty, although I see no direct allusion to it in any of the cases, except that of United Nickel Co. v. Melchoir, at Chicago, 17 F. R., 340, wherein it was before the court, and referred to by the judge hearing the case.

In that case, Judge Blodgett referred to the testimony introduced on the issue of novelty, additional to that which appeared to have been before presented to the courts, and referred to Boettger's solution, but said nothing had been presented that satisfied his mind of the want of novelty in Adams' invention. In this connection, he said: "Much testimony has been put into the record in this case bearing upon the question of novelty of these two patents. But a careful examination of the proof satisfies me, that all this testimony, which is worthy of attention, has been considered by the courts before whom these patents have been, heretofore, adjudicated, and that no new light is shed by the testimony upon the question of novelty. The same ground seems to have been gone over in the former cases, that is shown in this, and the devices held to be novel and patentable." This passage applies with even greater force to the present case.

Other scientific works, not introduced in this case, German and English, were referred to in the numerous cases heretofore tried, some in one and some in the others, but in all of the cases, the novelty of the invention was affirmed. When we consider the number, experience and ability of the counsel engaged in the numerous cases, heretofore, tried, and the number and experience of the judges, including nearly all the judges of the circuit courts, having

the most experience in patent cases, including Mr. Justice Blatchford, of the supreme court, it is, scarcely, to be supposed, that Dr. Boettger's description of a process has been overlooked, or has not been duly considered, and ruled upon.

Whatever the truth may be with reference to Dr. Boettger's experiments, and the work referred to, they seem to have been simply scientific experiments in the laboratory, in which he ascertained that by preparing, and using the material in the way he pointed out, nickel could be deposited, and nickel plating, on a small scale, be accomplished. That is as far as he went. He did not reduce it to a practical art. It does not appear, that he ascertained all the conditions, necessary to success, but simply that the particular solution would accomplish the object, as a scientific experiment. This discovery, was not employed or used in the general affairs of life, and down to 1869, there was no practical work of that kind, so far as the evidence shows—that is to say, it had not become a practical art. It was not applied to the practical and commercial uses of life. And Boettger's method is not even now used. All appear to be using Adams' invention. As Judge Blatchford said, Dr. Adams appeared to have first discovered the conditions necessary to practical nickel plating, and to have introduced his discovery into the arts, and applied it to the practical purposes of life. He ascertained the conditions, which were necessary, and reduced nickel plating to a practical, useful art. The value of nickel plating was known before, and it had often been sought to render it practically available, but the efforts made had never been successful, until Dr. Adams introduced it to the knowledge of the world. The strongest light, in which the evidence can be put, against the novelty, only shows that there is a doubt, whether nickel plating was reduced, by Dr. Boettger, to a practical art, in such a way as to avoid the patent. The patent is *prima facie* evidence of its novelty, and that must be overthrown. There was a great known want—a valuable use and demand for nickel plating in the affairs of practical life. Its value was known, and parties were seeking for some mode of making it available for the valuable uses to which it was applicable. Notwithstanding this recognized want, Boettger's process was not in use in practical affairs, prior to 1869. Immediately after the discovery, by Dr. Adams, and the promulgation of his patent, in that year, the art became known and largely practiced, and the product went into immediate, and extensive use. Manufacturies were established all over the country for nickel plating. All kinds of implements that go into the daily uses of practical life, were treated by his process. One witness says, it would be less difficult to mention things that were not nickel plated, than those that were. As soon as the practical question was solved, the product went immediately into extensive use, and that use increased from day to day from that time on. This fact constitutes convincing evidence that something was wanting in the processes previously known, and is very persuasive evidence of the novelty of Adams' invention. In view of all the circumstances,

it is amply sufficient to establish its novelty, and the testimony in this case, like that in the other case cited, is insufficient to rebut that proposition. I, therefore, hold that the novelty is established.

In my comments on the next proposition, it will further appear to what extent this invention has gone into use, and no doubt can remain as to its usefulness.

That proposition is, that the invention has been used under such circumstances as to estop the complainant from asserting its right under the patent. The circumstances mainly relied on, are that this solution which Dr. Adams used, in his process of electro plating, has been sold by his authority by the firm of Condit, Hanson & Van Winkle, in New Jersey, with descriptions given of the mode of using, and of all the conditions essential to successful nickel plating; that it was sold, not only by this firm, but it was sold, generally, by other firms. With reference to this fact, it is alleged, that the firm of Condit, Hanson & Van Winkle has sent out pamphlets, giving descriptions of the whole process, and advertising the solution and preparation under the patent, for sale, for the purpose of nickel plating, without indicating that it was patented. Several pamphlets were introduced by the defendant, to show that fact, some issued by the *old* firm of Hanson & Van Winkle, dated as far back as 1876. There is no notice in the earlier pamphlets of the patent, but, at that time, these parties were not agents of the complainant, but, were infringers themselves, and they then had suits for infringement, pending against them. In 1881, they issued a new pamphlet (defendant's Exhibit 8) and on the second page of the pamphlet we find this statement:

"After the decisions of Judge Blatchford, in the suits of the United Nickel Company against *a large number of manufacturers in New York*, in which the nickel plating patents were again sustained, and subsequent injunctions granted against the Gore and other solutions, the American Manufacturers Association, *composed of some forty of the largest manufacturers in the country*, decided, in a body, to abandon the suits and take out licenses; their action has been followed by many others throughout the country, *the licenses now numbering about three hundred.* The result has been, so far, to advance the price of nickel plated goods, notably saddlery, hardware, stoves, etc."

Then they go on, under the date of June 1, 1878, and publish this:

"The United Nickel Company has this day granted to Condit, Hanson & Van Winkle of Newark, N. J., the exclusive license for manufacturing cast nickel anodes, under their various patents, [the use of certain anodes is one of the claims in this patent, but not claimed to be violated, but complainant has other patents covering anodes] requiring from them a standard of quality that will insure the best results in the hands of our licensees, and at reasonable prices, to be governed by the market price of pure nickel.

"All nickel anodes manufactured by them hereafter will have the name of the United Nickel Company, and date of patents, upon

them; and we therefore notify all parties against manufacturing, selling, or using cast nickel anodes, not made under our license."

This is in the edition published in 1881. That agreement was made in June, 1878. It shows, that these patents having been contested and always sustained, all the nickel plating establishments then infringing combined together to abandon the infringement and take out licenses. This pamphlet is express notice, sent to purchasers with the goods purchased, of the condition of this patent; but that is not all. The manufacture and sale of this solution proposed under the patent, do not authorize the nickel plating covered by the first and fourth claims. The first and fourth claims of the patent do not cover the process of manufacturing the solutions necessary for nickel plating. That is embraced as a distinct invention under the third claim—the methods described for preparing the solution of the double sulphate of nickel and ammonia. The third claim of the patent, is as follows: "The methods herein described for preparing the solution of the double sulphate of nickel and ammonia and the double chloride of nickel and ammonium." The third claim of the patent, then, covers this process of making the proper solution to be used. Complainant does not claim that the third claim is infringed. Desiring, of course, to make the patent a success, complainant provides for a recognized place, where the solution, properly manufactured according to the patent in such manner as would make the nickel plating a complete success, can be obtained. Hence, Condit, Hanson & Van Winkle are authorized to sell that solution. These parties only bought the solution. Had they used it without having bought it from a licensed party, they would have infringed the *third* claim of the patent, as well as the *first* and *fourth*. The infringement of the third claim of the patent has nothing to do with the claims now infringed. Having bought the solution from authorized parties, there was no infringement of the third claim. But this fact does not affect any other claims of the patent. The fact that they purchased from authorized agents this solution, which enables them to nickel plate, does not, inferentially, or otherwise, authorize them to use it in nickel plating without obtaining a license to use the invention covered by the other claims. They must, also, get a license to use the inventions covered by the other claims, or they cannot use this without being liable as infringers. Each claim is, in effect, a separate and distinct patent, and the right to use one patent does not carry with it the right to use the others, without a further license. The first claim which is infringed is as follows: "The electro-desposition of nickel by means of a solution of the double sulphate of nickel and ammonia, or a solution of the double chloride of nickel and ammonium, prepared and used in such a manner as to be free from the presence of potash, soda, alumina, lime, or nitric acid, or from any acid or alkaline reaction." That is what the first claim is. It is plating by means of the described solution. and the conditions under which plating can be done is, that the double sulphate

of nickel and ammonia, or a solution of the double chloride of nickel and ammonium, must be prepared in such a manner as "to be free from the presence of potash, soda, alumina, lime, or nitric acid, or from any acid or alkaline reaction." Those are the essential conditions, which Adams discovered, and it does not appear that Dr. Boettger ever discovered that those were necessary conditions. It does not appear that he ever discovered that the absence of all these elements is essential to successful nickel plating, for commercial purposes. This is the first claim. The defendant has infringed it. The defendant uses Adams' preparation to accomplish his purposes. That preparation is covered by the third claim. The first is a claim in addition to that. The selling of the solution does not authorize, inferentially, or otherwise, the use of it for the purpose of nickel plating, whatever else it may be used for, without, also, procuring a license to nickel plate under the first and fourth claims, which are separate inventions.

Again, the defendant says, that at the time Adams discovered the necessary conditions for nickel plating and brought them before the public, the nickel of commerce was impure, and it was necessary to prepare it. Now, it is said, the nickel of commerce is pure, and any one can buy it, and the nickel plating can be accomplished by using it in the form in which it is found without going through the process preparing the solution as described by Adams, and that there is, consequently, no infringement by using now the nickel of commerce; that a more nearly pure article of nickel has been discovered, or, at all events, the nickel of commerce is in such a condition that it can be successfully used now in a solution not prepared in all respects under Dr. Adams' process. But consider this to be so, still all the conditions in the aggregate appear to be the same. If that be so, it only shows that commerce demands an article of nickel free from some of the deleterious elements, and, which is in a proper condition to be used in solution without otherwise previously eliminating them, hence, those preparations at this day for commerce. But, even on that hypothesis, Dr. Adams still discovered the conditions necessary to successful nickel plating, and the demands of commerce are, that the articles shall be in such a state as to conform to the conditions necessary to use in that art; that is to say, the nickel must be made in some way to conform to the conditions when in solution which he describes as necessary, in order to make nickel plating a success in the practical arts of life. The demands of commerce, therefore, on that hypothesis, are such, that the necessary conditions must exist; either in the preparation of the solution, or in the prior preparation of the nickel used which enters into the solution, but the use of the conditions of nickel plating is none the less a violation of the patent, because the nickel is put in a condition by which it can be introduced into the solution with less trouble and expense. All this preparation is made subsequently to the discovery of the conditions on which practical nickel plating can be successfully carried on, and, therefore, cannot avail,

to evade a violation of the patent. But the defendant did use complainant's solution in its works, and used his invention, and not that of any prior discoverer. I think complainant is not estopped, and that the first and fourth claims are infringed.

The fourth claim is:

"The electro plating of metals with a coating of compact, coherent, tenacious, flexible, nickel of sufficient thickness to protect the metal upon which the deposit is made from the action of corrosive agents with which the article may be brought in contact."

Let there be a decree for complainant, as to the first, and fourth claims, and a reference to the master to ascertain the profits and damages sustained.

CIRCUIT COURT, DISTRICT OF OREGON.

SEELEY v. REED.

November 2, 1885.

SUIT TO RESCIND CONTRACT ON THE GROUND OF FRAUD.—A court of equity will decree a rescission of a contract obtained by the fraudulent representations or conduct of one of the parties thereto, on the complaint of the other, when it satisfactorily appears that the party seeking the rescission has been misled in regard to a material matter by such representation or conduct, to his injury or prejudice.

IDEM.—But when the facts are known to both parties, and each acts on his own judgment, the court will not rescind the contract because it may or does turn out that they, or either of them, were mistaken as to the legal effect of the facts, or the rights or obligations of the parties thereunder; and particularly when such mistake can in no way injuriously affect the right of the party complaining under the contract, or prevent him from obtaining and receiving all the benefit contemplated by it, and to which he is entitled under it.

SUIT to rescind contract. The opinion states the facts.

Thomas N. Strong, for the plaintiff.

George H. Williams and *George H. Durham*, for the defendant.

DEADY, J. This suit is brought by the plaintiff, a citizen of Ohio, against the defendant, a citizen of Oregon, to have a contract entered into by the parties on March 27, 1884, cancelled, and a certain promissory note and certificate of stock then delivered by Seeley to Reed, in pursuance thereof, returned to him. The bill was filed July 29, 1884.

The case was heard and submitted on the bill, answer and replication and the testimony taken by the plaintiff. The execution of the contract in question is admitted. At the date of it, the parties were in New York and the plaintiff was a stockholder in the Oregon Iron and Steel company, a corporation formed under the laws of Oregon, of which the defendant was then the president. It begins with a recital, that Reed is willing "to advance or loan" said company, including the amount theretofore "loaned or advanced" to it, the sum of one hundred and fifty thousand dollars; that Seeley "is

willing and desires to obtain an interest of fifty thousand dollars in said loan, and to that end has given his note for that sum to Reed, payable in two years thereafter with interest at seven per centum per annum, and "delivered as collateral security for said note and the interest thereon, three hundred and sixty-one shares of the capital stock, full paid," of said company; in consideration whereof Reed agrees that on the payment of said note to redeliver to Seeley said shares of stock, "together with one-third of such bonds, stocks, notes or other securities," as he may obtain from said company, "in consideration of his said advance of one hundred and fifty thousand dollars;" and Seeley authorizes Reed in default of payment of said note "to sell or dispose" of said three hundred and sixty-one shares of stock, and the said one-third of the securities received from said company, subject, however, to the stipulation that if the proceeds of such sale or disposition are not sufficient to pay said note at the maturity thereof, Seeley shall not be further liable thereon, but the same shall be delivered to him; and in consideration of the premises, Seeley also agrees, if requested by said company, to act as its general manager for the period of two years, at a salary not exceeding three thousand dollars per annum.

The bill alleges that on August 22, 1883, the capital stock of the company was reduced from three million dollars to one million five hundred thousand dollars, and the number of shares thereof reduced correspondingly, but Seeley's certificate, No. 10, for seven hundred and twenty-two shares, was not surrendered and reduced to three hundred and sixty-one shares, of which it is, and in making said contract was, considered the equivalent; that at the date of the contract, the company was financially embarrassed, and the same was executed solely for the purpose of aiding it in raising funds; that Seeley had not been in Oregon for a long time, and got "almost all" his information concerning the condition of the company from Reed, who "falsely and fraudulently represented" to him that he had advanced over one hundred thousand dollars to the company, when in fact he was then and still is largely indebted thereto; that said certificate was delivered to Reed in trust until he should make the loan to the company and obtain the securities therefor, when it was to be held as collateral security for the payment of the note, which latter was delivered without any consideration except the contract; that shortly after Seeley arrived in Oregon, on and after July 10, 1884, he first examined the records of the company and discovered that Reed and his associates, "fraudulently contriving to wreck" said company, had "fraudulently and illegally appropriated and converted to their own use over four hundred thousand dollars in money and properties, of its assets;" whereupon he commenced a suit in this court against Reed and others, comprising the firm of Smith Bros. & Watson, and W. S. Ladd and others, comprising the firm of Ladd & Tilton, and E. W. Crichton, C. R. Donahue and H. A. Elliott, to compel the return to the company of said assets, which suit, the bill therein being held multfarious, was

on November 12 dismissed, when he commenced two suits in this court for the same matters, the one against a portion of said parties and the other against them all, which suits are still pending, and Seeley's right to maintain them depends on his being a stockholder of said company; that on July —, 1884, and divers days thereafter, Seeley demanded of Reed to return said certificate and note or perform his agreement and advance one hundred and fifty thousand dollars to the company, the former of which he refused and still refuses to do, and the latter of which he is now unable to do, and "is fraudulently attempting to make said company insolvent and financially embarrassed and unable to pay its debts; that said three hundred and sixty-one shares of stock have not been transferred on the books of the company and the legal title thereto is still in Seeley, but that on July 16, 1884, and since, Reed, to prevent Seeley from maintaining said suits and to enable him the better to carry out his scheme of wrecking said company, did fill up said blank transfer and power and attempt to have said shares of stock transferred to himself, and unless restrained will yet do so, for he and his associates have the control of said company, to the "irreparable injury" of the plaintiff and said company, and "to the mamifest and irreparable subversion of justice in the premises."

The defendant, by his answer, denies positively and specifically every charge in the bill of false, fraudulent or illegal purpose, representation or conduct, or that he is, or ever was, indebted to the company, and alleges that at and prior to the date of said contract, Seeley and himself were in New York conferring together concerning the financial troubles of the company, with a view to its relief, at which time the latter knew that the defendant had advanced in the neighborhood of one hundred thousand dollars to the company, and was fully advised of the proceedings of the directors; that Seeley then knew the financial condition of the company otherwise than from the defendant, and was in close relationship and correspondence with E. W. Crichton, the secretary and one of the directors of the company; that Seeley then and there proposed that if the defendant would buy of him sixty-two and one-half of the reduced shares of the company's stock, at its par value—six thousand two hundred and fifty dollars—and would enter into said contract, and take his non-negotiable note and said three hundred and sixty-one shares of stock as collateral security for its payment, he would come out to Oregon and attend to the business of said company, and relieve the defendant from further anxiety about the same; that Seeley, who was much better acquainted with said business than the defendant, represented to him that if this arrangement was made, he could put the business of the company upon a satisfactory footing, whereupon the defendant accepted the same and signed said agreement, and at this same time, and as a part of the same transaction, and to accommodate Seeley, he purchased from him said sixty-two and one-half shares of stock, and then and there paid for them, by cash four thousand and ninety dollars, and by the surrender of Seeley's note

of May 21, 1883, for two thousand dollars, with interest from date at eight per centum, making in all six thousand two hundred and fifty dollars; that thereupon Seeley delivered to defendant certificate No. 22 for one hundred and twenty-five shares of stock, with an endorsement thereon dated March 27, 1884, signed by him, and to the effect that it was to be surrendered and a new certificate issued in its place for half the amount, together with a power of attorney for the transfer of the same, and on April 8, 1884, delivered to the defendant certificate No. 10 for seven hundred and twenty-two shares of the company's stock, mentioned as three hundred and sixty-one shares of said stock in said contract, with a like power of attorney and endorsement thereon; that defendant did not want said sixty-two and one-half shares of stock, nor were they worth the price paid for them, and the chief inducement for their purchase was to get Seeley to come out to Oregon and take charge of the company's business, for which reason, at the latter's urgent request, he also, on April 10, advanced him five hundred dollars to defray his expenses to Oregon; that, soon after, Seeley came to Oregon, arriving in Portland on April 17, for the purpose, as defendant understood, of carrying out said contract, but instead of so doing, returned to New York about June 10, and proposed to the defendant, that he should acquire the property of the company, and convey one-fourth thereof to himself, one-sixth to Crichton, and one-twelfth to Donahue, with the management of the wole, for which Seeley was to give his note for one hundred and fifty thousand dollars, payable in thirty years, with interest at six per centum per annum, and said Crichton and Donahue were to give similar notes for one hundred thousand dollars and fifty thousand dollars respectively, to be secured by a mortgage on the property, and that this proposition was accompanied with a threat that, unless it was accepted, Seeley would sue the defendant, exhibiting, at the same time, an opinion prepared by his counsel, in which it was said—"in the hands of a skillful lawyer their mistakes [referring to the directors of the company] however innocent they might have been, would appear very suspicious, and the wreck of this fine property appear a premediated affair"—which proposition the defendant declined and insisted on the arrangement of March 27, 1884; that about June 16, the defendant, in pursuance of said contract, advanced the company thirty thousand dollars; that defendant arrived in Portland about June 30, and on July 7 proposed to the company to make it an advance sufficient with that already advanced, to make the sum of one hundred and fifty thousand dollars, which proposition, by the votes of Crichton and Donahue, who were then in the board of directors, was laid on the table, but was repeated on September 23, and laid on the table until October 21, when it was duly accepted, and thereafter, on October 23, the defendant, in pursuance thereof, advanced and loaned to the company twenty thousand eight hundred and forty-seven dollars and ninety-one cents, which, with his former loans and advances, made the sum of one hundred and fifty thousand

dollars; and that the blank assignment and power given to the defendant by Seeley, with the certificate No. 10, was filled up by the former in the due course of business before the commencement of the suit by Seeley against Reed, and others, and, according to the understanding with Seeley, at the date of the contract, but the secretary of the company, Crichton, acting in collusion with Seeley, illegally refused to make the transfer to the defendant, on the books of the company.

The defendant, also, in his answer, offers to rescind the contract and return the note and both the stock certificates if Seeley will return him the money paid on No. 22—six thousand two hundred and fifty dollars—which he avers was a part of the consideration of the contract.

The testimony taken by the plaintiff was quite voluminous, and covers a wide range: By far the greater portion of it relates to matters mooted in the other suits of his pending in this court, and have little or no application or weight in this.

The answer of the defendant is under oath, and so far as it is responsive to the bill, it is taken as true until the contrary is clearly established by the testimony of at least two witnesses, or one witness and clear corroborating circumstances: Hough v. Richardson, 3 Story, 692; Story's E. P., section 875*a*; Tobey v. Leonards, 10 Wall., 430.

The only ground on which the court can give the relief prayed for in this bill, is that by the fraudulent representation or conduct of the defendant in or about a matter material to the subject of this contract, the plaintiff was misled to his injury: Story's E. J., sections 201–2, 695; 2 Pom. E. J., section 910; Hough v. Richardson, 3 Story, 690; Smith v. Richards, 13 Pet., 36.

The allegations of fraud are vague and indefinite. They may be condensed into two statements. One, that the defendant, at the time of making the contract, told the plaintiff that the company owed him about one hundred thousand dollars, when in fact he was indebted to it. The other that some time before that date, the defendant and his associates, without saying who they are, had fraudulently appropriated to their own use, four hundred thousand dollars of the assets of the company.

The only evidence in support of the first allegation is the testimony of the plaintiff, which is contradicted by the answer of the defendant.

Looking into the evidence to see on what this question of indebtedness turns, I find that the company was organized in April, 1882, with eighteen thousand shares of stock of the par value of one hundred dollars each, which was subscribed by W. S. Ladd, W. M. Ladd and E. W. Crichton, the latter taking one thousand seven hundred and seventy, and the others one hundred and fifty shares each; that in the fall of 1882 the company purchased the property of the Oswego iron works, valued at six hundred thousand dollars, for twelve thousand shares of its stock, valued at fifty cents on the dollar, and

issued the same to S. G. Reed, H. Villard and D. O. Mills, three thousand shares each, and to W. S. Ladd, L. B. Seeley, C. P. Donahue and E. W. Crichton, seven hundred and fifty shares each; that soon after the remaining six thousand shares were issued Crichton as paid up stock, to be disposed of as such, at fifty cents on the dollar, for the purpose of purchasing machinery for the company, which stock Crichton soon after surrendered, and the same was reissued to the defendant for that same purpose, and that he disposed of one-half of said shares for the sum of one hundred and fifty thousand dollars, for which he accounted to the company, but being unable to dispose of the remainder, he returned them to the company, when the directors, at a meeting held on September 24, 1883, accepted the same, and returned his receipt therefor, and at the same time, in pursuance of a vote of the stockholders, at a meeting thereof, held on the same day, the directors reduced the stock of the company one-half, and ordered the unsold shares returned by the defendant canceled; and that the defendant, prior to the making of said contract, had, in fact, advanced to the company near about one hundred thousand dollars.

It also appears from the testimony of the plaintiff, as well as otherwise, that all these matters were known to him at and before the making of the contract, and that he and the defendant acted on the assumption that such were the facts, without either relying on the other for his information; but afterwards, and before commencing this suit, the plaintiff, on the advice of counsel probably, came to the conclusion that the legal effect of the facts was, and is, that the defendant was a subscriber for said six thousand shares of stock, and not the mere agent of the company for its disposal, and, therefore, was still indebted thereon to the company in the sum of one hundred and fifty thousand dollars, from which the directors had no power or right to release him; and that deducting his advance from this sum, he remained and was indebted to the company in the sum of fifty thousand dollars. Now, admitting that the plaintiff's present view of the defendant's liability in regard to this stock is the correct one, there is no ground for saying that the plaintiff was misled in this matter by the defendant. The plaintiff knew as well as the defendant that the directors had accepted the return by the latter of the three thousand shares of this stock, and the facts relating to it, and could and did judge for himself as to the effect thereof. At least, the defendant does not appear to have been either his informer or adviser in the premises, while he does appear to have been in close correspondence with his friend E. W. Crichton, who has been a director and superintendent of the company since its formation, and the secretary thereof since December 1, 1883.

But, admitting that the defendant was indebted to the company in the sum of fifty thousand dollars instead of the company being indebted to him in the sum of one hundred thousand dollars, and that the plaintiff was ignorent of that fact, the knowledge of it would not

have prevented him from entering into this contract, but on the contrary would have been an additional inducement to do so. In this matter the plaintiff appears to have sought and obtained an opportunity to take an interest with the defendant in a loan to the company, not simply for the good of the latter, so far as appears, but his own good, as well. The state of the account between the company and the defendant was a matter of no importance in the premises to the plaintiff, except as it indicated the solvency or not of the former and its ability to repay the loan with interest. So that the defendant being abundantly able to pay this supposed indebtedness to the company, the fact of its existence instead of operating as a fraud on the plaintiff, as a party to this contract, was an advantage to him, both as a creditor and a stockholder, to the extent, that it increased the company's assets.

As to the other charge, the material facts appear to be that in the spring of 1883, negotiations were opened between the company and the firm of Smith Bros. & Watson, of this city, for the purchase of their foundry property, that resulted in a proposition by the latter to sell the same, at a valuation of two hundred and twenty-five thousand dollars for four thousand five hundred shares of the company's stock, valued at fifty cents on the dollar, and at a stockholders' meeting held on March 20, 1883, it was voted to authorize the directors to make the purchase, and upon the receipt of proper deeds and bills of sale of said property, to issue to Smith Bros. & Watson, four thousand five hundred shares of paid up stock of the company; but the directors took no action in the premises, nor did the former ever make any conveyance or transfer of their property to the company. Subsequently they proposed to withdraw their proposition of sale, and at a meeting of the directors, held on September 24, 1883, their request was unanimously complied with.

In the meantime, between the making of the proposition and the withdrawal of the same, the two concerns maintained intimate business relations, but were carried on separately and without any consolidation. In this time Smith Bros. & Watson put up the large iron transfer or ferryboat for the Northern Pacific, to be used on the Columbia river, at Kalama, by which it is said they cleared one hundred thousand dollars, and did work for the company for which they were allowed and paid on settlement forty thousand dollars.

The charge that the defendant and his "associates," meaning, I suppose, his codirectors, W. M. Ladd, E. W. Crichton, C. R. Donahue and F. C. Smith, the persons constituting the board when Smith Bros. & Watson were allowed to withdraw, appropriated four hundred thousand dollars of the assets of the company to their own use is based on these facts.

In other words, it is boldly assumed that the company not only lost the value of the foundry property, the alleged profits on the transfer boat construction and the money paid for work done for it, in all three hundred and sixty-five thousand dollars, by the illegal action of the defendant and his codirectors on September 24, but

that these parties thereby wrongfully appropriated the same to their own use.

To begin with, the company could not have lost anything by not getting the foundry property unless it was worth more than it was to give for it, which does not appear, and that it could possibly have lost two hundred and twenty-five thousand dollars thereby, or any considerable portion of that sum, is, under the circumstances, simply absurd.

There is no proof of the profits made in the construction of the ferry boat, but it is highly probable that there were profits, and it may be admitted, for the purpose of this question, that they reached the figure stated—one hundred thousand dollars. The forty thousand dollars paid for work done could not have been lost to the company, unless the transaction was fraudulent or fictitious, which does not appear, but rather the contrary.

But admitting that there is no ground for the general allegation that the defendant and his associates converted these sums to their own use, it is alleged that the defendant was, at the date of the transaction complained of, a secret partner in the firm of Smith Bros. & Watson, and that, whatever the company lost by it, he, as a member of that firm, got a share of. Granting for the time being, that the defendant was a member of this firm, it does not follow that he was a gainer by any transaction between it and the company; even if the latter was the loser thereby. Taking the plaintiff's contention for true, the defendant was one of five persons constituting the firm of Smith Bros. & Watson, while it appears from the evidence that he was, and is the owner of one-fifth of the stock of the company, and was therefore liable to lose on the one hand as much as he could gain on the other.

And as to the question of whether the defendant and his co-directors acted wrongfully, or even improvidently, in consenting to the withdrawal of Smith Bros. & Watson's proposition, it must be remembered that it was done under the advice of eminent counsel, upon the very plausible ground, to say the least of it, that they could not be held thereto—the same not having been accepted by the directors, and the stockholders having no power under the corporation act to transact any such business.

But, however this may be, it is a sufficient answer to this charge, and to any claim the plaintiff may make on the facts involved in it, that he knew all about these matters, at and before he executed the contract, and was in no way misinformed or misled by the defendant concerning them.

With full knowledge of the facts, he then appears to have regarded the transaction as legal and honest and if he has since come to a different conclusion, or been advised that the company has a valid claim against the defendant and his "associates" for four hundred thousand dollars on this account, what possible cause is that for cancelling a contract for an interest in a loan to the company?

When the plaintiff executed this contract, he must have supposed

the company was more or less financially embarrassed, and yet he was not only willing, but desirous of taking a considerable interest in a large loan to it; but now, that he finds it has a valid claim, of which he was then ignorant, against solvent parties, for four hundred thousand dollars, a sum greatly beyond the company's indebtedness, he wishes to be released from his engagement upon the plea that this claim arises out of the previous misconduct of the defendant and his associates, which made this loan necessary.

Neither is the plaintiff entitled to have this contract rescinded, by reason of anything that has happened or been omitted, since it was executed. The defendant did not undertake absolutely to make this loan to the company, or to do so within any specific time; and in any event, the consent of the company must first be obtained, and the one hundred thousand dollars already advanced was to be considered a part of it. Doubtless he was bound to make the loan in a reasonable time, the circumstances considered, or return the plaintiff his note and certificate of stock. But the loan has been made in pursuance of the contract, and as soon thereafter as the company would accept it, and give the plaintiff the proper acknowledgment thereof and obligation to repay it.

And now, whether as a result of this transaction, the plaintiff is, or may become, a non stockholder in the company, and, therefore, unable to maintain any suit for relief against these transactions, if wrongful and injurious to the stockholders, is altogether immaterial, so far as this case is concerned. An otherwise valid contract cannot be cancelled on any such irrelevant ground or apprehension as this. If the plaintiff, by pledging his stock to the defendant as collateral security, with a blank assignment and power of transfer, has deprived himself of the right and privilege of a stockholder in the company, during the existence of the pledge, he must submit to such deprivation until he is ready to redeem the same by the payment of his note.

On the argument it was maintained, on behalf of the defendant, that the sale and purchase of the sixty-two and one-half shares of stock was a material part of the transaction resulting in the contract of March 27, and, therefore, no decree of cancellation ought to be made under any circumstances, unless the plaintiff is required to return the six thousand two hundred and fifty dollars received for this stock, on which terms the defendant, waiving all other objections, offers to consent to a rescission of the contract.

The evidence tends strongly to show that the transfer of this stock was a part of the transaction and a substantial element in the considerations which induced or caused the parties to enter into the contract of March 27. Seeley, who seems to have been without present means and in debt to Reed, appears to have made his coming to Oregon and taking charge of the company's business, as the latter desired, conditional on the purchase of this stock, while Reed appears to have made his consent to advance money to the company conditional on Seeley's taking charge of its business; and so it would seem

that the three things—the purchase, management and loan—were dependent parts of one whole.

But, as, in my view of the matter, the plaintiff is not entitled to the relief sought, irrespective of this question, I do not further consider it; and if the parties wish to rescind on such terms, they can do so without the aid of the court.

There is no equity in the bill, and it must be dismissed; and it is so ordered.

SUPREME COURT OF NEVADA.

STATE, EX REL. ATTORNEY GENERAL, *v.* HARRIS ET AL.

Filed November 7, 1885.

ELECTION OF TRUSTEES—CONSTITUTIONAL LAW—TRUSTEES FOR FIVE YEARS.—The provision of the school law of 1885, declaring that the term of trustee shall be five years in boards of five trustees, is in conflict with the constitutional prohibition declaring that "the legislature shall not create any office the term of which shall be longer than four years." Such being the case, the entire act fails, as it must be presumed that the legislature intended to establish a general plan for the election of school districts throughout the state, and as otherwise two systems would prevail.

APPLICATION for *quo warranto.* The opinion states the facts.

H. F. Bartine, for the relator.

A. C. Ellis, for the respondents.

BELKNAP, C. J. This is a proceeding by *quo warranto,* to determine whether the school trustees elected under the school law of 1885: Stats. 1885, 111; or those elected under the amendatory law of 1873, are rightfully entitled to the office of school trustees of Genoa school district No. 2. The controversy arises upon the provisions of section 2 of the act of 1885. The section is as follows:

"Sec. 2. An election for school trustees must be held in each district on the second Saturday of May of each year, at the district school-house, if there be one; and, if there be none, at a place designated by the board of trustees. First: The number of school trustees for any school district shall be three, except when the number of census children of the preceding year exceeds four hundred, then the board of trustees shall consist of five members. Second: In new school districts, or in case of vacancy for any cause in an old one, the school trustees shall be elected to hold office for one, two and three years respectively, from the first day of September next succeeding their election. Third: Except as provided in subdivision second of this section, one trustee shall be elected annually, to hold office for three years where there are three trustees, and for five years where there are five trustees, or until his successor shall be elected and qualified:" Stats. 1885, 112.

It is admitted that the provision which declares that the term of trustee shall be five years in boards of five trustees, is in conflict with the constitutional prohibition declaring that "the legislature shall not create any office, the term of which shall be longer than four years," except as otherwise provided by the constitution: Const., art. 15, sec. 11; but it is insisted that the general provisions of the act may be enforced in school districts of three trustees when the maximum term of office is three years, because this provision is constitutional, and that as to school districts of five trustees, elections may be held under the old law of 1873, in lieu of the unconstitutional clause.

If the clause providing for the election of five trustees be stricken out, and trustees for districts containing upwards of four hundred census children be elected under the law of 1873, as suggested, the intention of the legislature would be departed from in the following respects: 1st. In school districts of upwards of four hundred census children, one trustee would not retire from the board of trustees each year. 2d. The election of trustees in such districts would take place at the general biennial election, and not during the month of May of each year. 3d. The full term of office in districts of three trustees would be three years, and in other districts two and four years. 4th. An election in one class of districts would occur annually in the month of May, and, in the other class, biennially, at the general election.

An unconstitutional provision will not invalidate an entire enactment of the legislature, unless the obnoxious portion is so inseparably connected with the other that it cannot be presumed the legislature would have passed the one without the other.

"It is true," said the supreme court of California in Lathrop v. Mills, 19 Cal., 513, "that the constitution merely interdicts acts which oppose its provisions, and that if in any act there be found a provision which is constitutional, that provision may be carried out, provided the excepted provision is entirely disconnected from the vicious portions of the act, and the legislature is presumed to intend that, notwithstanding the invalidity of the other parts of the act, still this particular section shall stand. The saving of the particular provision, even when not upon its face unconstitutional in such instances, is, therefore, a matter of legislative intent. In order to sustain the excepted clause, we must intend that the legislature, knowing that the other provisions of the statute would fall, still willed that this particular section should stand as the law of the land."

Applying these principles, there is nothing in the provisions referred to suggesting an intent upon the part of the legislature that any particular portion of the law of 1885 should stand, regardless of the constitutional defects of other portions. If portions were selected out and upheld, two different systems for the election of school trustees would prevail, whereas the legislature apparently intended to establish a plan which should be general throughout the

state. Such intent enters so entirely into the scope of the law that upon no principle would a court be warranted in upholding separate provisions of the act.

The provision of the law under which respondents, M. Harris, J. Jones and F. Klotz, claim the office of school trustees of Genoa school district No. 2, being unconstitutional and void, a judgment of ouster must be entered against them, with costs. And it appearing that J. Q. Adams, H. Vansickle and J. S. Childs were lawfully elected school trustees of said school district, at a general election held upon the fourth day of November, 1884, and thereafter qualified and entered upon the performance of their duties as said school trustees, and continued therein, except as interrupted by respondents, a judgment declaring said Adams, Vansickle and Childs the lawful school trustees of said school district must be entered.

It is so ordered.

ALBION CON. MG. CO. *v.* RICHMOND MG. CO.

Filed November 9, 1885.

NEW TRIAL—AFFIDAVITS USED ON MUST BE IDENTIFIED.—Affidavits used on a motion for a new trial will not be considered on appeal, unless the same are endorsed by the judge or clerk at the time, as having been read or referred to on the hearing of the motion.

EVIDENCE—MODEL, MAP OR DIAGRAM USED FOR ILLUSTRATION NO PART OF.—A model, map or diagram of the *locus in quo*, used on the trial simply for the purpose of illustrating the testimony of the witnesses, and which are not introduced in evidence, are not part of the evidence which should be embodied in a statement on appeal.

STATEMENT ON APPEAL—DEEDS NEED NOT BE COPIED IN EXTENSO.—Deeds, and other muniments of title, need not be copied *in extenso* in a statement on appeal. A brief statement of their substance is sufficient when no point is made on the construction of the language used therein.

REVERSED JUDGMENT NO PART OF JUDGMENT ROLL.—A judgment of the district court, which has been reversed on appeal, forms no part of the judgment roll, and need not be introduced in evidence therewith.

NEW TRIAL—EVIDENCE REVIEWED.—The evidence as to the value of the ore removed by the appellant from the respondent's mine reviewed at length, and *held*, that the verdict of the jury was not sustained thereby, and that a new trial was properly ordered.

APPEAL from an order of the sixth judicial district court, Eureka county, granting the plaintiff a new trial. The opinion states the facts.

Wren & Cheney, for the appellant.

Baker & Wines and *Stewart & Herrin*, for the respondent.

HAWLEY, J. On the twenty-first day of October, 1873, E. H. Rose and others commenced an action in the district court of Eureka county, against the Richmond company, appellant herein, to determine the right of possession to certain mining ground. A trial of that case in 1881, in the district court, resulted in a judgment for the Richmond company from which Rose took an appeal to this court. The real controversy in that action, depended upon the question of the validity of the Uncle Sam location, owned by Rose *et al.*, and of the St. George and Victoria locations, and

patents therefor from the United States, owned by the Richmond company. This court declared the St. George and Victoria patents to be "absolutely null and void," and directed the district court to render a proper judgment in favor of Rose *et al.*, for the mining ground westerly of the line "A. C." as designated upon the diagram in evidence in that case: Rose *et al.* v. Richmond Mining Company of Nevada, 17 Nev., 25. An appeal was taken from this decision to the supreme court of the United States and that court on the fourth of May, 1885, affirmed the decision of this court: Richmond Mining Co. v. Rose *et al.*, 114 U. S. Rep., 576.

The present action was brought to recover damages for the value of the ore alleged to have been taken by the Richmond company from the mining ground west of the line "A. C." The complaint alleges that nine thousand two hundred and eight tons of ore were extracted and removed by the Richmond company, of the value of sixty-five dollars per ton, amounting to the sum of five hundred and ninety-eight thousand five hundred and twenty dollars. It is further averred that by the working of the mine plaintiff was damaged in the sum of ten thousand dollars, making a total of six hundred and eight thousand five hundred and twenty dollars.

The jury before whom this cause was tried, found a verdict in favor of plaintiff for thirteen thousand two hundred and fifty dollars. The plaintiff being dissatisfied with this verdict, moved the district court for a new trial which was granted upon two grounds, viz.: (1) "Insufficiency of evidence to justify the verdict." (2) "Irregularity of the defendant by which plaintiff was prevented from having a fair trial."

This appeal is taken by defendant from the order of the district court granting a new taial.

1. The question whether there was any irregularity upon the part of appellant, was, upon motion of appellant, eliminated from the case. It was presented upon affidavits which were not indorsed by the judge or clerk "at the time as having been read or referred to on the hearing" of the motion for new trial: Stat. 1,869, 227, section 197; and upon the authority of Dean v. Pritchard, 9 Nev., 232, the affidavits were stricken from the statement on appeal.

2. Appellant contends that the question whether the court erred in granting a new trial upon the ground of insufficiency of the evidence to sustain the verdict, cannot be considered because the statement, notwithstanding the recital therein, that "the above and foregoing testimony was all the evidence offered and received in said action," affirmatively shows that it does not contain all the evidence. This contention is based upon the fact that the statement shows that a glass model of the mining ground was used at the trial in the district court to illustrate the testimony of the witnesses, and that certain maps and diagrams were referred to by the witnesses which are not made a part of the statement on appeal. It is argued that without the model, maps and diagrams, a portion of the testimony will be unintelligible to this court. It does not appear, from the

statement, that the model, maps or diagrams, or either of them, were offered in evidence, hence, they were properly excluded from the record on appeal.

Upon the trial of important mining cases, it is quite frequently the custom of litigants to exhibit a model of the mine to be used in the court room instead of asking for an order to have the jury take a "view of the premises," the models being constructed in such a manner as to show the various levels, drifts, tunnels, excavations, ore bodies, and such other matters as may be in controversy, and to enable the witnesses to illustrate their testimony by a reference thereto. Before these models came in vogue it was, and if a model is not used it is still, occasionally the practice to allow the jury to view the premises for the purpose of enabling them the better to comprehend the testimony of the witnesses; but the courts have never held that such a view was a part of the evidence in the case which must be included in the statement on appeal. It is allowed for the purpose of enabling "the jury, by the view of the premises or place, to better understand and comprehend the testimony of the witnesses respecting the same, and thereby the more intelligently to apply the testimony to the issues on trial before them, and not to make them silent witnesses in the case:" Close v. Samm, 27 Iowa, 508; Wright v. Carpenter, 49 Cal., 609.

If the model is intended to establish any independent fact and is introduced in evidence and used in the court below for that purpose, provision should be made to have it brought before the appellate court. In the present case, the model was not intended to establish any fact, and was not used for any such purpose. If the maps and diagrams had been offered in evidence, they should have been embodied in the statement on appeal; but the fact is that they—like the model—were only used for the purpose of illustrating the testimony of the witnesses, and as they were not introduced to establish any fact in the case, it was unnecessary to offer them in evidence.

In People v. Cochran, the court said: "A diagram is not a public nor private writing, nor is it made by law primary or secondary, or *prima facie* evidence of any fact or object represented by it. When used on the trial of a case, it is not used as evidence, it does not prove nor tend to prove, in the sense of evidence, any fact; it is simply a figure drawn to suggest to the minds of the jurors the relation between objects about which a witness is testifying, and may be drawn on paper or on a stationary blackboard, which cannot be removed. The very construction of the figure itself is defined by the testimony of the witness, and, as illustratory of his testimony, it partakes of it, in the same way that the clearness of the expression of the witness partakes of his evidence:" 61 Cal., 552.

The statement recites the fact that "the defendant offered in evidence, for the purpose of showing its good faith in its entry and removal of the ore in controversy, patents from the United States to the Victoria and St. George mining claims, which patents were issued by the government of the United States to the defendant be-

fore the ore in controversy was taken out and were upon the same ledge and lode as the Uncle Sam claim, and covered the ground from which the ore in controversy was taken;" that the "plaintiff introduced in evidence notices of location of the Uncle Sam, Albion No. 1, 2, 3, and Albion Consolidated, and introduced *mesne* conveyances to show it was vested with the title of the original locators of said mining claims." The plaintiff also offered in evidence the judgment roll in Rose *et al.* v. Richmond Mining Company of Nevada. This judgment roll does not contain the original judgment of the district court which was reversed by this court, upon appeal.

Appellant argues that, because the patents, the notices of location and *mesne* conveyances, and the reversed judgment were not set out in full, the statement does not contain all the evidence. This position is purely technical and without merit. The omissions complained of are wholly immaterial. It was unnecessary to encumber the statement by copying the language of the parties, even if they had been offered to prove title, unless there was an objection made to their being admitted in evidence, which required an inspection of their contents. No objection was made to the notices of location or *mesne* conveyances. The substance of the documents as recited in the statement is all that was necessary to be inserted in the record on appeal.

"Instead of copying into a statement for a new trial or on an appeal, deeds and transcripts of records, when no point is made on the construction of the language, a brief statement of the instrument answers every purpose:" Knowles v. Inches, 12 Cal., 214.

The judgment of the district court, which was omitted from the judgment roll had been reversed by this court and was without force or effect, and if it had been included, would not have added anything of value to the statement.

3. Appellant argues that the evidence is insufficient to justify any verdict in favor of respondent, in this, that the statement fails to show any title in respondent to the mining ground at the time of the alleged trespass. This position cannot be maintained upon any sensible view of the evidence contained in the statement. The question of title was in issue, under the averments in the complaint and answers; but when the cause was tried there was no controversy as to the ownership of the ground. The question had been settled by the decision of this court in Rose v. Richmond M. Co. True, the decision of the supreme court of the United States had not been rendered at the time of the trial of this case. The pendency of that appeal might have been sufficient cause for a continuance of this case; but until that decision was rendered it was certainly the duty of the district court to follow the decision of this court.

The St. George and Victoria patents having been declared absolutely null and void, would not have furnished any muniment of title in favor of appellant, even if they had been offered, or considered in evidence, for that purpose. In the statement of the facts presented by the record on appeal in Rose v. Richmond M. Co., it

was stated by this court in its opinion "that at the time of the trial of this action the Albion Consolidated Mining Company was the owner of the Uncle Sam claim, and this action is prosecuted for its benefit by the consent of the plaintiffs." But the question did not depend alone upon the title, as settled in that case. The statement, independent of the judgment roll in Rose v. Richmond, affirmatively shows that respondent was the owner of the mining ground during the time of the alleged trespass. Respondent introduced in evidence the notices of location and *mesne* conveyances, hereinbefore mentioned, "to show it *was vested* with the title of the original locators of said mining claims." At what time was respondent vested with the title to this property? There is but one answer to this question. The issue, as raised by the pleadings, related to the ownership of the ground at the time of the alleged trespass, to wit: between the twenty-ninth day of December, 1879, and the twenty-seventh day of May, 1882. The evidence offered, not having been objected to, must be considered as relevant and material to the issues presented by the pleadings. The statement that the locations and conveyances were introduced to show that respondent was vested with the title, has reference to the period of time mentioned in the pleadings. The case was tried upon the theory that respondent was the real owner of the ground. The court so instructed the jury in explicit terms:

"You are instructed that the documentary evidence produced by plaintiff is sufficient, and does establish its ownership of the mining premises described in the complaint, lying westerly of the line "A. C.," and you are instructed to consider the plaintiff is such owner, so far as this trial is concerned, and was such owner at all times between the twenty-ninth day of December, 1879, and the twenty-seventh day of May, 1882."

If the notices and conveyances offered were considered insufficient for the purpose of showing title at this time, objection should, and doubtless would, have been made in the court below. In the absence of any objection to their sufficiency, it was, as before stated, unnecessary to copy the entire documents.

"It is seldom necessary to insert an entire deed in a statement. Where a conveyance is regular and no question is made on it, it is sufficient to say in the statement that a deed of such a date conveying the land from A. to B. was introduced, *or that conveyances were introduced* showing that the title of A. had become vested in B:" Kimball v. Semple, 31 Cal., 664.

4. Did the court err in granting a new trial upon the ground of insufficiency of the evidence to justify the verdict?

There was a decided conflict of evidence both as to the quantity and value of the ore extracted and removed by appellant. The jury were primarily the judges of the credibility and weight of the testimony of the respective witnesses. The district judge, however, "has jurisdiction, on motion for a new trial, to decide, as a question of fact, whether the scale of evidence which leans against the ver-

dict very strongly predominates:" Phillpots v. Blasdel, 8 Nev., 76; and if there is in his opinion, a "clear preponderance of evidence against it," he "should not hesitate to set aside the verdict:" State v. Yellow Jacket S. M. Co., 5 Nev., 422; but in the exercise of this power he "should be careful not to invade the legitimate province of the jury when they have manifested a fair and intelligent consideration of the evidence submitted to them:" Solen v. V. & T. R. R. Co., 13 Nev., 135.

The district court "ought not to grant a new trial where there is conflicting evidence, except the weight of evidence clearly preponderates against the verdict." If the district court grants a new trial upon this ground "the appellate court will not interfere unless the weight of evidence clearly preponderates against the ruling of the district court:" Treadway v. Wilder, 9 Nev., 70.

With these well settled principles we will proceed to review such portions of the evidence as is deemed necessary for a determination of the question under consideration. It is admitted that the ore does not work as high as the assays; that the assay value of the ore is not the true value; that silver is assayed "at the rate of one dollar and twenty-nine one-hundredths, an arbitrary standard, although the actual value of silver is very much below that."

The answer denies the quantity and value of the ore as alleged in the complaint; but admits that the defendant dug down, mined and removed from the mining ground two thousand one hundred tons of ore of the value of four dollars per ton, and that said mining claim was thereby damaged in the sum of eight thousand four hundred dollars, and that other damage was committed, as alleged in the complaint, to the extent of five hundred dollars. The ore was taken from different places in the mine designated by the witnesses as ore body B, Southeast Upraise, Fire Drift, Gooseneck, Fort Probert, Leadville and Jumbo Cave. The greatest quantity being taken from ore body "B." "All the ore taken out by the Richmond company," says the witness, Wescoatt, "was between December, 1879, and December, 1881, except Jumbo Cave. The ore was taken from Jumbo Cave in the summer or fall of 1882." There is a variance in the testimony of the respective witnesses as to the proportion of waste to be deducted from the amount extracted. For the purposes of this opinion, we shall adopt, without discussion, the evidence as offered by appellant that, from the gross amount, there should be deducted one-third for waste, and fourteen per cent for moisture.

ORE BODY B. Testimony upon the part of respondent: E. M. Robinson, who is a civil and mining engineer and surveyor, and was superintendent of respondent's mine, testified that there had been six thousand and sixty-nine tons of ore taken out by the Richmond company, of the value of sixty dollars per ton gold and silver, and twenty-six per cent lead. N. Wescoatt, who is a civil and mining engineer and surveyor, and who was in the employ of the Richmond company, from 1877 to 1882, and was assistant superintendent of

the mine during the last three years of his employment, testified that he was "very familiar with the ore taken from ore body B. * * * I think it would average from fifty to fifty-five dollars in gold and silver, and a considerable percentage in lead." Thos. J. Read, a civil engineer, and superintendent of mines, estimates the value at from fifty to sixty dollars per ton. J. N. Williams, who had been a foreman in the mine of the Albion company, and was well acquainted with the character of this ore, testified that from his experience as a miner, the ore taken out "would average fifty dollars per ton; it was a good grade of ore." Other testimony was offered tending to show that the value of this ore was from fifty to sixty dollars per ton.

Testimony upon the part of appellant: R. Rickard, who was the superintendent of the Richmond company when the ore was extracted and removed, testified that he had "a good idea of the quality of all the ore taken out by the Richmond company west of the A. C. line. I think it would assay in gold and silver about thirty-five dollars, or forty dollars per ton; that is, the ore taken from ore body B.;" that "the grade of Richmond ores smelted was about fifty dollars on an average. We have lots of ore from the Richmond mine of a higher grade than ore body B;" that "the average assay of the ore from the Richmond mine is from forty-five dollars to fifty-five dollars per ton. Ore bodies vary considerably—generally lower grade near the edges. I think thirty-five dollars to forty dollars, a fair average;" that "the profit on thirty-five dollar ore was two dollars and ninety-eight cents per ton and the average of thirty-five dollar and forty dollar ore was five dollars and twelve cents per ton. I made a mistake; it is three dollars and sixty-one cents per ton." He then made the following calculations: "Take one hundred tons of ore of the value of thirty-five dollars per ton, twenty-three dollars silver and twelve dollars gold, contains one thousand seven hundred and seventy-eight ounces of silver and fifty-eight ounces of gold and twenty-five tons of lead; after deducting smelting losses, leaves one thousand six hundred and thirty-five and seventy-six one-hundredths ounces of silver, fifty-one and four one-hundredths ounces of gold and twenty-one and twenty-five one-hundredths tons of lead. Value of the lead at New York prices, one thousand seven hundred and forty-nine dollars and ninety-three cents; silver, one thousand seven hundred and thirteen dollars and five cents; gold, one thousand one hundred and twelve dollars and fifty-eight cents: total four thousand four hundred and seventy-five dollars and fifty-six cents; further deductions: freight, thirty dollars and fifty-seven cents per ton to San Francisco on the total weight; separating, thirty-five dollars per ton, equals sixty-five dollars and fifty-seven cents per ton; deductions one thousand three hundred and thirty-six dollars and ninety-three cents and commissions forty-four dollars and seventy-five cents; total one thousand four hundred and thirty-eight dollars and eleven cents. Total value, net crude bullion, three thousand and thirty-seven dollars and forty-five cents or thirty dollars and thirty-seven cents per ton; mining and

smelting twenty-four dollars and ninety-four cents per ton; deduct from the net yield, leaves five dollars and forty-three cents per ton net profit on thirty-five dollar ore."

Upon his cross-examination he testified that the market value of fifty dollar ore would be twenty-four dollars and eighty-five cents per ton; of fifty-five dollar ore it would be twenty-eight dollars and seventy-two cents and of sixty dollar ore it would be thirty-two dollars and twenty cents. Upon his redirect examination he testified as follows: "I stated yesterday that the market value of ore that assays fifty dollars per ton was twenty-four dollars and ninety-eight cents; twenty-seven per cent lead, deductions for mining and transporting, nine dollars and thirty-six cents, leaves fifteen dollars and sixty-two cents, which is the market value of fifty dollar ore. Forty dollar ore, with the deductions, eight dollars and fifty-three cents per ton, and thirty-five dollars per ton ore, with the deductions, would leave five dollars and five cents per ton as the market value."

In relation to the amount of ore taken out he testified as follows: "I have heard the testimony in relation to the sets of timber in ore body B. I have heard it stated that there were two hundred and seventy-two sets of timbers taken out by the Richmond company. As I calculate it, fifteen cubic feet of ore to the ton, there would be in ore body B. three thousand four hundred and twenty-seven tons. After deducting one-third for waste, there would be two thousand two hundred and eighty-five tons. After deducting fourteen per cent for moisture there would be one thousand nine hundred and sixty-five tons; there would be a still further reduction if all the sets were not full sets."

Testimony was offered by appellant, to show that the sets of timbers in ore body B. were not full sets, and it is claimed that a still further reduction of the number of tons testified to by Mr. Rickard should be made upon this account. The numbers of the timber sets were taken from the testimony of Mr. Wescoatt, who testified that while in the employ of the Richmond company he "went into that portion of the mine whenever it was necessary to survey for the sets of timbers. I went into the mine once or twice a month and made a record of all the sets I could find. I had charge of the underground workings." Appellant introduced a letter from Mr. Wescoatt, written on the eighteenth of January, 1885, in reply to a letter from Mr. Rickard, in which he stated that in the summer of 1882, he spent several months compiling maps for the geological survey of the Eureka district, and that during this time he made a horizontal sectional map "showing all the timber sets that had been put in the Richmond ground" between certain points, and that "this map showed that the Richmond company had taken out about three hundred sets of timbers northwest of said A. C. line." Mr. Wescoatt, upon being called in rebuttal, testified as follows: "I meant just what I said in the letter. It did not refer to ore taken where there were no timber sets put in. In the estimate, two hundred and seventy-two sets that absolutely existed. Then I reduced

the Gooseneck, made twenty-four sets, and five sets from the thirteenth, made three hundred and one sets. There was ore taken from other points: Fire Drift, Fort Probert and end of Albion main level, Jumbo Cave and some other places, of which I had no means of estimating. In counting the timber sets, reduced them to full sets. Made three hundred and one full sets, didn't count the parts of sets as full sets."

This testimony, although severely criticised and commented upon by appellant's counsel, is not contradicted. Appellant's witnesses all testified that the sets of timbers were not full sets; but none of them said that, if reduced to full sets, there would not be three hundred and one full sets. They did not give, or pretend to give, the number of sets, independent of Wescoatt's testimony, but simply stated that the sets of Richmond timbers were not full sets.

Returning to the question of the value of the ore, the statement shows the following estimates made by practical miners in the employ of the Richmond company:

Thomas J. Pearce: "I should judge that the ore in ore body B would assay from thirty-five dollars to forty dollars per ton."

John G. Jury: "I think ore body B would assay, on the whole, about forty dollars per ton."

S. Longley, a foreman in the mine: "I worked in ore body B two months. * * * I am well acquainted with the ore in the Richmond mine, I can generally estimate about what the ore will assay. I think that ore would assay in the neighborhood of forty dollars per ton in gold and silver, I think that would be a good average."

SOUTHEAST UPRAISE. Respondent's testimony: Robinson testified "that there was seven hundred and ninety-three tons of ore in that ore body." Appellant's testimony: Rickard testified that the upper part of this ore body "was taken out by the Richmond; there was five hundred and twenty tons in that;" after deducting waste and moisture, "there would be two hundred and ninety-eight tons net."

FIRE DRIFT. Respondent's testimony: Robinson testified that the ore was extracted from this place in August, 1880; he estimated the amount at three hundred tons and thought it "would assay up to eighty dollars per ton and thirty per cent lead." Appellant's testimony: Rickard said: "I know the place called the Fire Drift. We took out a few sets there,—I expect it is correctly represented here on the model,—about three hundred tons. After deducting one-third waste and fourteen per cent moisture there would be one hundred and seventy-two tons."

GOOSENECK. Respondent's testimony: Wescoatt testified that "the ore from the Gooseneck was taken out some time in the early part of 1881." Robinson estimates the amount at four hundred and ninety-five tons. Appellant's testimony: Rickard testified as follows: "In the Gooseneck the Richmond took out two hundred and fifty-six tons gross; after deducting one-third for waste and fourteen per

cent for moisture, there would be one hundred and forty-three tons." W. J. Retallick, upon his cross-examination, said that the ore in Gooseneck "was pretty rich; would assay from sixty dollars to seventy dollars per ton." Lew. Dunkle: "I think the ore in the Gooseneck would assay forty dollars or fifty dollars per ton."

FORT PROBERT. Respondent's testimony: Robinson estimated the amount of ore taken out by the Richmond company at six hundred and fifteen tons and said: "The ore in Fort Probert was very high grade ore; the remnants of the ore that was left was very high grade ore, went high, seventy-five dollars per ton in gold and silver. I do not remember about the lead in that." Appellant's testimony: Rickard testified that "Fort Probert was a natural cave. I don't think we ever took any ore out of there." Upon his cross-examination he said: "I don't think the Richmond took out any ore from what is called Fort Probert. My recollection is, none taken out. I may be mistaken about that. My impression is, though, there was none taken out. Wouldn't swear one way or the other." Longley said: "We took some ore out down at thirteenth chamber. I think from Fort Probert about two hundred tons; it was taken out in 1880." Making the deduction for waste and moisture as in the other ore bodies, would leave the amount one hundred and five and one-third tons.

LEADVILLE. Respondent's testimony: Robinson estimates the amount of ore taken out at six hundred and thirty-five tons, and states its value at "fifty dollars per ton, and fifty per cent lead." There is some confusion as to the dates when this ore was removed. Wescoatt testified that the Richmond company took the ore in the "latter part of 1879 or 1880. * * * November or December, 1879. * * * We struck Leadville in November, 1879, and it was taken out in December." Upon his cross-examination he said: "The body of ore in Leadville was discovered in November, 1879, and we started to take it out in December. I think there had been but a few sets taken out by December 26 (29), 1879. It was all taken out by May, 1880."

Appellant's testimony: Rickard testified that "Leadville was not taken out by us." Upon his cross-examination, he said: "I don't think Leadville was taken out by us." Longley said: "I cannot recollect definitely how much ore was taken out of there. I think, about one hundred and fifty tons." Reducing this amount, as in other ore bodies, by deducting the waste and moisture, would make seventy-nine tons net.

JUMBO CAVE. Robinson testified that one hundred and thirty-six tons of ore was "taken by the Richmond company," from this place; but as there is no positive testimony that this ore was taken before the twenty-seventh of May, 1882, within the time alleged in the complaint, we exclude it.

The foregoing is a fair synopsis of the testimony with reference to the particular ore bodies. There is a great deal of testimony in the statement on appeal as to the working of similar ore from the same

ore bodies by the respondent; the samples of ore assayed; the number of cubic feet of ore to make a ton; the size and dimensions of the timbers used in the mine, and other matters tending more or less to corroborate the claims of the respective parties as to the amount and value of the ore. No separate account was kept by the Richmond company of the number of tons of ore, or of its value, removed and smelted by it from the ground west of the A. C. line.

The testimony introduced by respondent tended to show that the ore in ore body B was of greater value than the ore in other parts of the mine, and that the ore from this place was mixed with ore from other places, by the Richmond company, in order to reduce its value. Wescoatt testified that the ore taken out from ore body B "was mixed in the chutes and run into the cars, and went down to the furnaces with ores from other parts of the mine," and that the Richmond company was "in the habit of taking ore from ore body B at that time and mixing it with ore of lower grade, from other parts of the Richmond mine, to make it of an average value." The testimony offered upon the part of appellant tended to show that the ore from this ore body was of a less grade than the ore from other parts of the mine. Longley testified that the Richmond company "mixed other ore from different parts of the mine with the ore from ore body B to raise the grade of ore body B."

There was, also, general testimony given by Mr. Rickard, as follows: "Three hundred sets of timbers will represent the whole amount taken out by the Richmond company, including waste—two thousand one hundred and fifty tons, in all, taken out by the Richmond company west of the A. C. line." Upon his re-direct examination he said: "In my judgment, there was two thousand one hundred and fifty tons of ore taken out by the Richmond company, west of the A. C. line, from the Albion ground. I don't know whether there was any taken from Fort Probert or not. The value of the ore taken was about forty dollars assay value per ton."

Taking the amounts given by him in each of the ore bodies, we have in ore body B. one thousand nine hundred and sixty-five tons; Southeast Upraise, two hundred and ninety-eight; Fire Drift, one hundred and seventy-two; Gooseneck, one hundred and forty-three; a total of two thousand five hundred and seventy-eight tons; add to this, as testified by Longley, one hundred and five and one third tons from Fort Probert, and seventy-nine tons from Leadville, and we have a total of two thousand seven hundred and sixty-two and one third tons, as testified to by appellant's witnesses. From this, perhaps, there should be deducted, say twenty-nine tons for the amount of ore taken from Leadville prior to the twenty-ninth of December, 1879. This would leave a total of two thousand seven hundred and twelve and one-third tons net.

The testimony upon the part of respondent, makes about nine thousand tons gross. The deductions for waste and moisture, claimed by appellant, would leave the amount over four thousand five hundred tons net. Estimating the amount of ore and the value

upon the testimony of respondent's witnesses, we have many thousands of dollars more than the amount found by the jury. Estimating the net amount of the ore at two thousand seven hundred and twelve and one-third tons, as testified to by appellant's witnesses, and its value at forty dollars per ton, as testified to by some of the witnesses for appellant, and the market value at eight dollars and fifty-three cents per ton, as testified to by Mr. Rickard, we have the sum of twenty-three thousand one hundred and thirty-six dollars and twenty cents; adding the admitted damages of five hundred dollars, and legal interest for three years, would make a total of thirty thousand seven hundred and twenty-seven dollars and six cents, which is seventeen thousand four hundred and seventy-seven dollars and six cents more that the verdict of the jury. Even estimating it at thirty-five dollars per ton, the lowest amount named by any witness, and the market value at five dollars and five cents, which is the lowest amount named by Rickard, in connection with any of his calculations as to the expenses of reducing the ore and deductions to be made from the assay value, we have the amount of thirteen thousand six hundred and ninety-seven dollars and twenty-eight cents; with damages and legal interest added as above, it amounts to eighteen thousand four hundred and fifty-six dollars and forty-six cents, which is five thousand two hundred and six dollars and forty-six cents in excess of the amount found by the jury.

These conclusions render it unnecessary to consider whether the district judge, by his criticisms upon the appellant's witnesses, in granting a new trial exhibited any passion or prejudice, or whether from the testimony it is made to appear that appellant acted innocently, and in good faith in removing the ore, or was guilty of such culpable negligence as to make it liable for the gross value of the ore, and some other minor questions argued by counsel.

The verdict of the jury cannot be sustained upon any impartial, rational or intelligent consideration of the evidence as set forth in the statement on appeal.

The order of the district court granting a new trial, is affirmed.

SUPREME COURT OF OREGON.

McCLUNG *v.* STEWART, ASSIGNEE, ETC.

Filed October 26, 1885.

EXEMPTION FROM EXECUTION—WATCH—WEARING APPAREL.—A watch of moderate value may be exempt from execution or assignment by any insolvent debtor, as "necessary wearing apparel." But in a controversy between the debtor and his assignee, if the former claims such watch as exempt, he must affirmatively show the facts which sustain his right to the exemption claimed.

APPEAL from the circuit court. The opinion states the facts.

J. K. Weatherford, for the appellant.

H. H. Hewitt & L. Flynn, for the respondents.

LORD, J. This is an appeal from an order of the circuit court requiring the appellant, an insolvent debtor, to surrender and deliver up to his assignee, for the benefit of his creditors, a gold watch and chain, valued by his evidence to be worth from fifty to seventy dollars. By his deed of assignment the appellant transferred to his assignee all his property except such as was exempt from execution, but without any specification of such exempt property. The contention of the appellant is, that a watch and chain may be properly considered as an article "of wearing apparel," and, as such, it is exempt from execution, and protected by his assignment. Our statute provides that the "necessary wearing apparel owned by any person to the value of one hundred dollars," shall be exempt from execution if selected and reserved by the judgment debtor, or his agent, at the time of the levy, or as soon thereafter before the sale thereof as the same shall be known to him, and not otherwise: Code, sec. 297, and sub. 2.

The question whether a watch is a necessary article of wearing apparel, and, as such, exempt, seems, from the decisions, to depend upon the particular facts, or attendant circumstances of each case, such as the value of the watch, the condition and business of the debtor, etc., and has been differently decided under different circumstances. In *Re* Steele, the meaning of the term "wearing apparel," used in the bankrupt act, was carefully considered by Hammond, J., of the United States district court for the western district of Tennessee. John Steele had been allowed, and claimed no exemption except a watch which was described as "a plain old-style single case gold watch, which he had owned for twenty-five years or more, and which would scarcely sell for twenty-five dollars." The question was, whether it could be held by him as exempt under the law exempting "other articles and necessaries," and "wearing apparel." The learned judge said: "It would not be doing any great violence to the meaning of the term 'wearing apparel,' as used in the bankrupt act, to include in it a gold watch of moderate value. The definition of the word apparel, as given by lexicographers, is not confined to clothing; the idea of ornamentation seems to be rather a promi-

nent element in the word, and it is not improper to say that a man "wears" a watch or "wears" a cane. The exemption law of Arkansas says that "wearing apparel, except watches, shall be exempt:" Ark. Dig., 503; 4 James' Bankruptcy, 58; Avery and Hobbs' Bankruptcy, 68. The court allowed John Steele the watch.

In Rothschild *et al.* v. Bretler, 18 Minn., 362, it was held that a silver watch and chain, worth forty or fifty dollars, worn by the debtor, is not exempt under the statute as "wearing apparel of the debtor and his family," the court say: "That an article *may be* worn does not make it wearing apparel within this statute. The words are to be construed in this case according to the common and approved usage of the language, namely, as referring to garments, or clothing generally designed for wear of the debtor and his family." In Gooch v. Gooch, 33 Me., 535, it was held that a watch which the testator had been in the habit of carrying with his person does not pass by a bequest of his wearing apparel. Wells, J., says: "The ordinary meaning of wearing apparel is vesture, garments, dress: that which is worn by or appropriated to the person. Ornaments, may be so connected and used with the wearing apparel, as to belong to it; there are implements, such as pencils and penknives, carried about the person, but not connected with the wearing apparel, these are not to be considered as clothing. To which class does a watch belong? It may not properly be called an implement, for it is used merely to look at, neither is it used as clothing or vesture. In its use it more nearly resembles the pencil or penknife. The court are of the opinion that the watch did not pass under the phrase wearing apparel." In Sawer v. Heirs of Sawer, 28 Vt., 251, it was held that a watch was not to be deemed wearing apparel. The court say, "though a watch may have a farther use than mere ornament, yet there is not enough to make it and its incidents wearing apparel." But on this point Redfield, C. J., thought otherwise, saying that "it seems to me that a watch which one wears and the chain and seals are dress and apparel." In Smith v. Smith, 16 Geo., 490, an insolvent moved to exempt from sale a watch that he claimed to be part of his "wearing apparel." His wife had claimed and been allowed a gold watch. The court say: "Various articles of property have from time to time been exempted by the legislature from this liability, but among these articles is not to be found watches unless they come under the head of 'wearing apparel.' It is doubtful whether they can be made to come under that head; if, however, they can, we think that not more than one can be made to do so." In Mack v. Parks, 8 Gray, 520, which was an action of *tort* for taking the plaintiff's watch from his person by force, the court seems to have considered the watch as "part of his dress or apparel." As having some bearing upon this subject, see also *In re* Thiel, 4 Biss., 241; *In re* Graham, 2 Biss., 449; Bumpus v. Maynard, 38 Barb., 626; Herm. on Ex., sec. 99.

The exemption, however, under our statute, is limited to the "necessary wearing apparel owned by any person, to the value of

one hundred dollars." In construing the word "necessary" in such connection, the courts have been inclined to a liberal, rather than a rigid construction. In Towns v. Pratt, 39 N. H., 349, under a statute exempting the "wearing apparel necessary for the debtor and his family," the court say: "The word 'necessary,' as here used, is not to be understood in its most rigid sense, implying something indispensable, but as equivalent to convenient and comfortable: Peverly v. Sayles, 10 N. H., 356. It would, therefore, include such articles of dress or clothing as might properly be considered among the necessaries in contradistinction to the luxuries of life." Dovlin v. Stone, 4 Cush., 359. If a watch is in no sense "wearing apparel," as some of the authorities indicate, the judicial construction of the word "necessary" is of no importance. On the other hand, it would seem that if a watch worn by a person, may be considered as a part of his dress or apparel, the word "necessary," as judicially construed, would not so materially affect the meaning of the phrase "wearing apparel" as to exclude it. It is probably true that a watch is ordinarily worn more for convenience than as a mere luxurious ornament. But to determine whether it is one or the other, necessary or luxurious, as an article of dress or apparel, the value of the watch is allowed to have a controlling influence in determining that result. If the value of the watch be unreasonable, or too much money be invested in it, the law regards it, as justice to the creditors would require, rather as a luxury than a necessity. And under our statute this element of value would necessarily become an important factor as the exemption of "wearing apparel" is limited to one hundred dollars. But, as we have seen upon the question whether a watch is a necessary article of wearing apparel, the authorities are conflicting, upon the whole, our own judgment inclines us to the opinion that the phrase "necessary wearing apparel" as used in our statute may include in it a watch of moderate value without doing violence to its meaning. We are not, therefore, prepared to say that a watch of moderate value is not a necessary article of wearing apparel, and as such exempt, when it is made to appear affirmatively, that the watch and other articles of apparel selected or reserved do not exceed the amount limited by the statute.

"*Prima facie*, all the personal property of a judgment debtor is liable to levy and sale upon execution. If he would claim exemption for any of such property, he must bring himself and property within the exception of some statute, by proper proof. No property in his possession is exempt *per se*:" Davis v. Prossen, 32 Barb., 291.

It lies with the party claiming property to be exempt to prove the facts affirmatively which go to establish it. Until it is made to appear, at least, what are the articles, and their value, of wearing apparel, selected and reserved by the judgment debtor, the court cannot determine whether the privilege of the exemption laws have been properly exercised, or abused to the injury of creditors. There is nothing in the deed of assignment, or in this record, to show

what articles of wearing apparel, or the value of the same, which the appellant has reserved, except that he testifies that he has kept as exempt a gold watch and chain worth from fifty to seventy-five dollars. What other wearing apparel, and from the necessity of the case he must have retained some, the quantity and its value he is silent about, the creditors have a right to know, and the facts lie within his knowledge, and unless he shows affirmatively the facts which sustain his right to the exemption claimed, the court will hardly aid him by presumption. This the appellant has not done, and the record before us discloses no error.

The judgment must be affirmed.

BOON *v.* BOON.

Filed October 29, 1885.

DIVORCE—FORM OF DECREE—DIVISION OF PROPERTY—CUSTODY OF MINOR CHILDREN.—The provision of section 495 of the civil code, that "whenever a marriage shall be declared void and dissolved, the party at whose prayer such decree shall be made shall in all cases be entitled to the undivided one-third part * * * of the whole of the real estate owned by the other party at the time of the decree," etc., is imperative; while the provision of section 497, empowering the court to further decree, for the care and custody of minor children, and for the recovery from the party in fault of such an amount of money as may be just for the maintenance of the other, is permissive only.

THE SAME.—A decree of divorce should provide for the care and custody of the minor children, if there are any.

THE SAME—CRUEL TREATMENT—EVIDENCE.—The evidence in support of the allegations of cruel and inhuman treatment by the defendant reviewed at length, and held not to warrant a decree of divorce.

APPEAL from the circuit court. The opinion states the facts.

B. F. Bonham, for Duenna Boon.

George H. Burnett and *Mark A. Fullerton*, for H. D. Boon.

THAYER, J. This appeal is from a decree rendered by the circuit court for the county of Marion, in a suit brought by Mrs. Duenna Boon against her husband Mr. H. D. Boon, for a divorce. The circuit court granted Mrs. Boon the divorce, but did not decree her any portion of her husband's property, nor make any provision for the custody and support of the children of the parties, nor grant alimony to the wife. Both parties appealed, the plaintiff from a part of the decree, the neglect to grant her the third interest in the defendant's real property, provide for the care and custody of the children and decree the recovery of an adequate sum of money for their support; the defendant from the whole decree.

Section 495 of the civil code provides that "whenever a marriage shall be declared void or dissolved, the party at whose prayer such decree shall be made, shall in all cases be entitled to the undivided one-third part, in his or her individual right, in fee, of the whole of the real estate owned by the other at the time of such decree, in addition to the further decree for maintenance provided for in section 497; and it shall be the duty of the court, in all such cases, to

enter a decree in accordance with the provision." Said section 497 empowers the court to further decree, for the care and custody of the minor children, and for the recovery from the party in fault, such an amount of money in gross or installments, as may be just and proper for such party to contribute to the maintenance of the other. This section is only permissive in form, but the former one is imperative. I think, however, that the decree in such a case would be imperfect unless it provided for the care and custody of the minor children, if there were any. The decree therefore should be modified if allowed to stand. The defendant claims that it should not stand but that it should be reversed upon the grounds that the allegations of the complaint and proofs submitted do not warrant it.

By the laws of this state, a dissolution of the marriage contract may be declared at the suit of the injured party for certain causes, among which is, for cruel and inhuman treatment, or personal indignities rendering life burdensome. The suit, in this case, was instituted upon that ground, and it is claimed upon the part of the wife that she has been subjected to that character of treatment by her husband.

It appears that the parties married in 1871; that they had five children, the oldest aged twelve years, and the youngest aged three years, at the time that the suit was commenced. The husband has been in business, keeping a book store, and is still engaged in that business, and has been successful, financially; has accumulated a reasonable competency; that he has supported his family comfortably, and that the wife and children have a good, comfortable home. The husband has been unfortunately addicted to drinking to excess at long intervals, but it has not incapacitated him from attending to his affairs, or rendered him morose or ugly. The wife says herself, "that he is harmless on such occasions." She, however, claims that for a number of years past he has manifested a jealous disposition towards her when she would speak to other gentlemen, and find fault with her when she would go out in town, for so doing; that upon such occurrences he would taunt her by inquiring whether she had not been to some disreputable place or called on some disreputable person. She says that for some time past she has been in poor health, has been under medical treatment for disease peculiar to females, and that her physician had advised her that unless her husband would, to a great extent, refrain from sexual indulgence she could not be successfully treated, but that against her protest, and the advice of the physician, the husband had persisted in sexual intercourse with her to such an extent, as she was advised by her physician, that it had greatly injured her health and endangered her life.

The proofs in the case were mainly directed to the question of the husband's jealousy, and his conduct connected therewith. A number of charges of misconduct on his part are made in the evidence, but which he has explained away or denied. The charges in the complaint are of such a character that if the proof showed that the

husband had been imprudent, unreasonable and persistent, it would not necessariy establish "cruel and inhuman treatment or personal indignities rendering life burdensome."

Jealousy on the part of a husband may arise from a strong attachment for his wife, from high sense of honor for her reputation, and a desire that she shall be and appear perfect. Again, it may be incited by imprudent conduct upon her part. She may so demean herself as to attract attention and cause comment, and nothing is more calculated to exasperate a sensitive man than that. Whenever, therefore, his conduct has resulted from the influences referred to, and has not been too unreasonable and violent, it could not be deemed "cruel and inhuman." It is where he evinces a malignant desire to vex, annoy and harrass the wife, that he could be justly chargeable with the character of conduct referred to. The husband who provides a suitable home for his family, and a reasonable and proper maintenance for his wife, is not liable to be actuated by malicious motives in his conduct toward her.

I assume in the outset that the plaintiff has been to the defendant a virtuous wife; but it cannot be claimed, in the light of the evidence, that she has always been prudent in her conduct, and amiable in her temper. Her riding with a certain young man upon two occasions, her visiting his place of business, and her sitting upon the porch with another young man an unseemly length of time, while staying at a certain summer resort, were acts calculated to excite comment, and did occasion remark; and reports were conveyed to her husband regarding her conduct in those particulars. The acts in themselves may have been, and no doubt were, entirely innocent, but were not prudent. These reports, coming to the husband, and several anonymous letters that evidently some vile wretch sent him through the postoffice and otherwise, warning him of her infidelity, seem to have occasioned all the alleged misconduct on his part complained of. And it is no wonder if he did, under the circumstances, become excited and aggressive. What husband would not, in such a case, demand an explanation from his wife—would not with great solicitude inquire what it meant, and would not enjoin upon her a strict observance of highly proper conduct. The evidence tends to prove that he set a watch upon her movements. She certainly could not complain of that, and, as I remember the evidence, did not. The information he had received was well calculated to excite suspicion, and as long as he continued his investigation in good faith for the purpose of ascertaining the truth or falsity of the reports, he acted properly. His own honor and the honor of his children was involved in the affair.

The counsel for the plaintiff animadverted with much stress upon the fact that he did not destroy at once the anonymous letters he received. It is true that those letters were indecent and unfit to be read, and the first impulse of virtuous indignation would naturally be to destroy them. But their author was guilty of a crime. Whoever he was, he committed an offense when he transmitted obscene

matter of that character through the United States mails. Both the plaintiff and defendant manifested a desire to detect the guilty person. Now, without the letters, there would be no evidence of the offense. In view of that it would be necessary to preserve them, and it may be that they were preserved in consequence of that fact.

Said counsel further claims that the defendant "believed the contents of the letters to be true; that he taunted the plaintiff in regard to matters contained in one of them." The matter referred to is the statement in the letter that she was accustomed to meet men at their barn, and she testifies that defendant came home in haste one morning and said he was a going to have his barn insured. She says that "at the time he did not say why, but she found out that he had been warned in the letters; that he was afraid they would have a cigar and set the barn on fire." How she found this out does not appear, and I imagine that she only inferred it, the inference may have been correct, or may not. The defendant might not have had that circumstance in view at all when he made the remark, but if he had, it very probably was intended as facetious.

She testified, in answer to this question, "Did your husband ever accuse you of unchastity or improper or criminal relations with other men?" that he never did; so that she could not have regarded the remark referred to in any such light. I am unable to discover in the case any sufficient proof of cruel and inhuman treatment as alleged in the complaint, nor does the plaintiff seem to claim it. When Dr. T. L. Golden asked her, after the suit was commenced, what were her grounds for expecting a divorce, her answer was, "that Mr. Boon objected to her going where she pleased, and with whom she pleased, and that she thought a woman had a perfect right to do as she pleased and go with whom she pleased." It may be inferred from this that she regarded the marriage relation with her husband as too much of a restraint upon her free course. The charge that the defendant unreasonably insisted upon having intercourse with her seems to be wholly unsupported by the evidence. It appears, also, from the proofs that the plaintiff is unfortunate in her disposition and temper. This is probably occasioned from her sickness. A witness who had for more than a year lived in the family says: "I have seen her pout, be mad; I hardly ever knew what she was mad at." "I have seen her pout for a week." Besides, she seems to have been very intimate with a neighbor lady, to whom she has been accustomed, I should infer, to communicate her family affairs. These circumstances have very likely served, to a great extent, to create dissension and antagonism between her and her husband. Amity and concord cannot long continue after the family confidence is shared with outside parties.

I have not referred to the conduct of the plaintiff as a justification of the acts of the defendant. He very probably has done wrong in many instances, but I think we have a right to consider all the circumstances surrounding the case: Harper v. Harper, 29 Mo., 301.

The plaintiff's counsel says that these parties cannot live together as husband and wife should. This, of course, the court has nothing to do with. It can only determine whether the evidence establishes good grounds for a separation, and if it believes that the charges alleged in the complaint have not been sufficiently proved, it can do no less than deny the relief prayed. As I look upon the matter, the court would assume a grave responsibility in the premises, if it granted the divorce. The parties to the suit are not the only ones interested in the affair. The welfare of five minor children is to be taken into consideration. What is to be done with them in case of a separation? If the care and custody of them was given to the wife, provision would necessarily have to be made for their support. In that event the accumulation of the parties would have to be divided, the management of a great portion of it confided to the wife, who, in all probability, has had no experience in such matters, the husband would be left with a remnant, disheartened and discouraged. The inevitable result would be, that the property, now amply sufficient to support the family, and which, if prudently managed, will continue to increase, would be frittered away and destitution be the consequence. I do not believe it necessary to produce such a state of things in order to remedy evils, that, comparatively, are trifling. The parties can live and cohabit happily, they have no occasion to change their home from an Eden, as it might be, into a pandemonium, and I have faith to believe that if left to themselves, they will adjust their affairs much better than the court could if it were to undertake it. The effort, in my opinion, would leave them in a much worse condition and imperil the happiness and welfare of innocent children. Such a course is contrary to my judgment, and, I believe, abhorrent to the feelings of every one who views the matter impartially. The law does not sanction such interference in any case unless the necessity is absolute. It will dissolve the marriage relation when the conduct of one of the parties towards the other is cruel and inflicts such a degree of pain of body or mind, as to render life burdensome.

After a due consideration of all the facts in this case, I am convinced that the proofs do not establish the charge made by the plaintiff in her complaint and that it ought therefore to be dismissed. Some provision should, however, be made in regard to the costs and expenses of the litigation which can be considered before entering the decree.

Decree below reversed and bill dismissed.

STINSON *v.* PORTER, EXECUTOR, ETC.

Filed November 2, 1885.

VOID JUDICIAL PROCEEDINGS, WHEN ADMISSIBLE IN EVIDENCE.—A void probate proceeding, to cure which a deed has been executed between the parties, is admissible in evidence, as a private writing and as part of the *res gestæ*, in a subsequent action founded on such deed, to explain and show the circumstances and consideration under and for which the deed was executed.

APPEAL from the circuit court. The opinion states the facts.

John Kelsay, for the appellant.

L. T. Flinn and *C. E. Wolverton*, for the respondent.

LORD, J. The plaintiff brought this action to recover of the defendant as executor, a certain sum of money, alleged to be the consideration of a certain deed executed by the plaintiff and her husband to certain parties, which said consideration came into the hands of the defendant's testator and was received by him for the use of the plaintiff.

The defendent, among other things, by way of explanation or inducement, set up in his answer certain proceedings which were had in the probate court some years prior, by which it appeared that the guardian of the plaintiff had attempted to convey the identical property which was the subject of the deed aforementioned, and alleging that such proceedings were irregular and defective, and that, by reason thereof, failed to effect the object contemplated, and that to obviate this defect, or in other words, because these probate proceedings were irregular and defective, the subsequent deed was executed, etc. After issues joined, in the progress of the trial, the defendant, in support of his allegation, offered in evidence a certified copy of these proceedings, to which the plaintiff objected as irrelevant, on the ground that the proceedings were void. The objection was overruled by the court, and this constitutes the only assignment of error.

It is clear, from the proceedings, that it was not sought by the defendant, to establish any right by virtue of the probate proceedings, for they were alleged to be defective, and the record of them was offered to show that fact, and that the property attempted to be conveyed by the guardian, was not conveyed. The purpose of showing these facts, was to explain what led to the execution of the deed by the plaintiff subsequently.

It is a mistake to suppose because a judicial proceeding or decree is void, it is not proper or relevant as evidence for any purpose. In Wildey v. Bonney's Lessee, 31 Miss., 649, it was held that although a judicial proceeding for the partition of land among coparceners may be void for uncertainty in the designation of the parcels allotted to the several parties, yet, if it be referred to, in a parol agreement made between them to divide the land, it may be introduced in evidence as a private writing, being a part of the *res gestæ*. The court say: "The report and proceedings of the commissioners were here offered, as connected with subsequent agreement made be-

tween the parties, and their conduct in relation to the land, showing that a parol partition was made between them. The report and plat of the lands, though not valid as a judicial partition, were necessary to explain the acts of the parties with reference to them, and if these proceedings were sanctioned by the parties interested and they afterwards made them the basis on which they divided the lands among themselves, such ratification would render their proceedings valid as a part of the agreement for partition, and they would be competent evidence, as private writings, forming part of the *res gestæ*." In Hill v. Parker, 5 Rich., S. C., 96, it was held that while an incomplete proceeding in equity binds nobody as a decree, it may be evidence of its own existence and the consequences therein deducible. The court say: "The proceedings there can have no effect against anybody as a judgment, but the papers which contain them may be evidence of their own existence and the consequences which thence result." In Wheeler v. Ford's Heirs, 6 Dana, 438, it was held that the record of a void decree may be used to show how the complainant *claimed to hold* the land.

Under some circumstances, a judicial proceeding which is void, may sometimes be used in evidence as a private writing. As a part, however, of these proceedings, it was not questioned but what the receipt was valid, and that parol evidence was admissible to explain the object or purposes for which it was given. Upon this record, we must suppose, that the evidence was sufficient to satisfy the jury of that object.

The judgment must be affirmed.

STINSON *v.* PORTER, EXECUTOR, ETC.

Filed November 2, 1885.

VOID JUDICIAL PROCEEDINGS, WHEN ADMISSIBLE IN EVIDENCE.—A void probate proceeding, to cure which a deed has been executed between the parties, is admissible in evidence, as a private writing and as part of the *res gestae*, in a subsequent action founded on such deed, to explain and show the circumstances and consideration under and for which the deed was executed.

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tween the parties, and their conduct in relation to the land, showing that a parol partition was made between them. The report and plat of the lands, though not valid as a judicial partition, were necessary to explain the acts of the parties with reference to them, and if these proceedings were sanctioned by the parties interested and they afterwards made them the basis on which they divided the lands among themselves, such ratification would render their proceedings valid as a part of the agreement for partition, and they would be competent evidence, as private writings, forming part of the *res gestæ*." In Hill v. Parker, 5 Rich., S. C., 96, it was held that while an incomplete proceeding in equity binds nobody as a decree, it may be evidence of its own existence and the consequences therein deducible. The court say: "The proceedings there can have no effect against anybody as a judgment, but the papers which contain them may be evidence of their own existence and the consequences which thence result." In Wheeler v. Ford's Heirs, 6 Dana, 438, it was held that the record of a void decree may be used to show how the complainant *claimed to hold* the land.

Under some circumstances, a judicial proceeding which is void, may sometimes be used in evidence as a private writing. As a part, however, of these proceedings, it was not questioned but what the receipt was valid, and that parol evidence was admissible to explain the object or purposes for which it was given. Upon this record, we must suppose, that the evidence was sufficient to satisfy the jury of that object.

The judgment must be affirmed.

SUPREME COURT OF CALIFORNIA.

No. 9,715.

ESTATE OF SWAIN, DECEASED.

In Bank. Filed November 1st, 1885.

ESTATES OF DECEDENTS—PRESENTATION OF CLAIMS NOT DUE.—Under the provisions of the code of civil procedure, regulating the settlement of the estates of deceased persons, as the same existed in 1872, all claims against a decedent's estate, whether due or not due, should be presented to the administrator within legal time after publication of notice to creditors; and if they were not so presented the law declared them "forever barred."

THE SAME—CLAIM DEFINED—STATED ACCOUNT—INTEREST.—The term "claim," as used in connection with the estates of deceased persons, has reference to such debts or demands against the decedent as might have been enforced against him in his lifetime by personal actions for the recovery of money, and upon which a money judgment could have been rendered. A statement of a balance struck upon an account between the claimant and the decedent, is a sufficient statement of the claim, if properly verified, for the presentation of it to the administrator. If such claim be allowed and approved as presented, the presumption is that it was allowed upon "vouchers and proofs," to the satisfaction of the administrator and the probate judge. Thus, if interest on the account be allowed at more than the legal rate, in the absence of evidence to the contrary, a written contract for the payment of such rate of interest will be presumed.

APPEAL from a judgment of the superior court of the city and county of San Francisco, settling the account of an administrator. The opinion states the facts.

W. C. Burnett and *R. W. Hart*, for the appellant.

Cobb & Moore, Winans & Belknap, H. C. McPike, Edw. J. Pringle, Clement, Osment & Clement, Geo. A. Nourse and *M. B. Blake*, for the respondents.

McKEE, J. In this proceeding the superior court of the city and county of San Francisco, sitting as a court of probate, upon the settlement of the final account of the administrator of the estate of R. B. Swain, deceased, decreed the allowance and partial payment of certain claims against the estate, which, having been allowed by the administrator and approved by the probate judge, were duly filed. The claims thus allowed and ordered paid amounted to sixty thousand dollars. Three of them were contested at the final settlement.

The first of these claims is as follows:

1. Estate of R. B. Swain, deceased, 1871, to John Boardman, Dr.:

April 8th—To balance of account as rendered this date...	$4,498 32
November 6th—To cash received this date as per account.	2,104 66
February 17th, 1883—To interest on $4,498.32 from April 8, 1871, to June 14, 1872, at 1½ per cent per month....	811 57
February 17th—To interest on $2,104.66 from November, 1871, to June 14, 1872, at 1½ per cent per month.....	192 92
	$7,607 47

The second:

2. Estate of R. B. Swain, deceased, to Cartwright, Harrison & Co., Dr.:

For balance of account due this day as per statement hereunto annexed.....	$6,751 79

R. B. Swain, Esq., in account current and interest to December 31, 1871, with Cartwright, Harrison & Co., 1871:

January 1—To balance of account rendered		$6,310 16
December 30—Interest to 31st inst	$441 71	
Less your portion of balance of interest account 29 at 28 per cent	08—	441 63
E. E		$6,751 89

New York, January 2, 1872.

3. And the third was a claim in favor of Mudge, Sawyer & Co., based upon fourteen promissory notes, each of which was dated seventeenth May, 1869, and made payable at New York to the order of R. B. Swain—the first being payable on the first of December, 1872, and each of the others, six months after its preceding note became due—the last being payable on the first of June, 1879.

The claims were presented to the administrator in 1873, within due time after the publication of notice to creditors of the estate. Publication was made as required by section 1,490, code of civil procedure, by the administrator, in the year 1872.

At that time every holder of a claim against the estate of a decedent was required by law to exhibit the same, verified by affidavit, to the administrator within legal time after publication of notice to creditors for that purpose. The law required that the affidavit upon which to make presentation of the claim must be made "by the claimant himself, or some one in his behalf." If made by a person other than the claimant, it was required of him to set forth in the affidavit the reason why the affidavit was not made by the claimant, and to state "that the amount of the claim was justly due; that no payments had been made thereon which were not credited, and that there were no offsets to the same to the knowledge of the claimants or affiant."

None of the claimants verified the contested claims by their affidavits. Each affidavit was made by persons other than the claimants, who describe themselves as "agents and attorneys of the claimants." The affidavit to the claim of Mudge, Sawyer & Company, substantially conforms to the law under which it was made. But thirteen of the promissory notes upon which the claim is founded, were not due at the time of the presentation of the claim to the administrator, and it is contended that the claim was non-presentable, and that the administrator had no authority to allow it.

But the law was then, as it is now, when a person died intestate all his property, real and personal, without any distinction between them, was chargeable with the payment of his debts: Section 1,358, C. C.; 1,516, C. C. P.; and it was made the duty of his administrator to ascertain the amount of claims outstanding against the estate for which it may be liable, so as to provide for their payment out of the assets of the estate. For that purpose the law required that *all claims* against the decedent, due or not due, should be made known to the administrator by exhibiting them to him verified by the nec-

essary affidavit so that he could pass upon their genuineness and validity by allowance or rejection. Upon ascertaining in that way the amount of the liability of the estate the law then cast upon the administrator the duty to report the condition of the estate, "designating the names of the creditors, the nature of each claim, when it became due, or *when it will become due*, and whether it has been allowed or rejected:" Section 1,512, C. C. P.

If the claim was allowed and approved, the allowance *prima facie* established its validity against the estate. If it was due and rejected, the claimant was required to establish its validity by suit upon it within three months after rejection, or, *if it was not due*, then within two months *after it became due*: Section 1,498, C. C. P.; and if its validity was established by recovery thereon, the judgment entitled the claimant to rank as a creditor of the estate and to payment in due course of administration, or if the administrator allowed the claim although not due, it entitled the claimant to rank in the same way and upon deducting a rebate of interest upon the claim, entitled him to payment of the principal sum, or to share in a distribution of the estate *pari passu* with creditors whose allowed claims were due: Section 1,648, C. C. P.

From these provisions of the code law, as it was at the time of the presentation of these claims, it is manifest, that *all* claims against a decedent's estate, whether due or not due, could be presented to the administrator within legal time after publication of notice to creditors; and, if they were not so presented, the law declared them "forever barred." We are, therefore, of opinion that although the promissory notes were not due when the claim based upon them was presented to the administrator of the estate in question, it was under the law presentable and allowable as a valid claim against the estate. No interest upon it was demanded, and upon the settlement of the administrator's final account, it was properly adjudged to be a valid claim for the principal of the notes.

The next contention is, that the statement of each of the other claims is insufficient to constitute a cause of action, or of claim, against the estate; that the statement of each is also ambiguous and unintelligible, and that the claims themselves were not authenticated according to law.

The affidavits verifying these claims were irregular. Each was made by a person other than the claimant, styling himself as "agent and attorney of the claimant." In one, no reason is stated why the affidavit was not made by the claimant. In neither does the affiant state that there were no payments or offsets to the claim, except what is credited *to his own knowledge*; although it is stated that there were no payments or offsets against the claims to the knowledge of the claimants. These omissions made the verifications of the claims defective.

And the statement of each claim is not free from ambiguity. Each is founded upon an alleged balance due on an account current, in which interest, at a higher rate than is legally allowable in mat-

ters of account, is computed on the debit and credit sides of the account, according to some commercial rule of computation which does not appear in the statement.

But, although neither of the claims was verified in all particulars, as required by law, and the statement of each is not as clear as it might have been, we think each was substantially sufficient for presentation and allowance under the law.

The term "claim," as used in connection with the estates of deceased persons, has reference, says Mr. Justice Field, in Fallon v. Butler, 21 Cal., 25, to such debts or demands against the decedent as might have been enforced against him, in his lifetime, by personal actions for the recovery of money, and upon which a money judgment could have been rendered.

A balance struck upon an account between parties is such a demand as would constitute a sufficient cause of action. A suit brought upon such a cause of action against Swain in his lifetime would, therefore, have been maintainable, and the statement of such a cause of action in the complaint would have been sufficient to support a judgment against him. Being sufficient for the maintenance of an action against the decedent in his lifetime, it would also be sufficient after his death, for the presentation of it to his administrator, if properly verified, as a claim against his estate.

As the subject of a suit, if the statement of the cause of action upon the account was deemed objectionable, defective, or insufficient, the defendant in the action would have had the right to demand a bill of particulars of the items of the account which were to be proved. And as the subject matter of a claim presented to his administrator he also had the right to demand a bill of particu ars or "vouchers and proofs" of the account: Section 1,494, C. C. P.

Both claims were allowed and approved as presented, and the presumption is that they were allowed upon "vouchers and proofs" to the satisfaction of the administrator and the probate judge, as to the principal and interest due on the accounts. Interest is recoverable upon a balance of indebtedness founded on money transactions, or upon an account between parties from the time the amount is ascertained by them. In the absence of an agreement in writing to pay more than lawful interest, the legal rate only ought to be allowed; but there may have been proof of an agreement in writing to pay the higher rate charged on one side of the account and credited on the other side.

In law, the allowance of the claims, although made upon defective verifications, was not void. It was a judicial act which entitled the claims to rank as acknowledged debts of the estate to be paid in due course of administration; but as a judicial act in their favor it was not binding and conclusive against the heirs, because they were not parties to it. They had therefore the right to question the allowance at the settlement of the estate. The burden of showing the invalidity of the allowance was, however, cast upon them: Es-

tate of Lohse, 62 Cal., 413; Estate of Crosby, 55 Cal., 579; Estate of Schroeder, 46 Cal., 318.

The heirs in this case did question the allowance and approval of the claims. But in the contest which was made, the claimants, by affirmative proof, established the validity of the claims and the court upon that hearing adjudged them to be valid. There was no exception taken to the evidence given in the contest; nor is there any specification in the record of any particular in which the evidence was insufficient to justify the decision and judgment of the court, nor is there any specification of errors in law, occurring at the trial, to which exceptions were taken by the contestants.

The evidence is therefore not reviewable; and as we find no errors of law apparent upon the record, the judgment and order appealed from must be affirmed.

It is so ordered.

ROSS, J., MYRICK, J., MORRISON, C. J., and MCKINSTRY, J., concurred.

WEST COAST REPORTER.

WHOLE No. 100. NOVEMBER 26, 1885. VOL. VIII. No. 4.

CIRCUIT COURT, DISTRICT OF CALIFORNIA.

WELLS, FARGO & CO. *v.* CARR ET AL.

November 5, 1885.

PROMISSORY NOTE—ASSIGNMENT OF MAIL CONTRACT—CUTTING DOWN ROUTE—FAILURE OF CONSIDERATION—PAROL EVIDENCE INADMISSIBLE TO VARY WRITTEN CONTRACT.—The defendants executed their promissory note in pursuance of a written contract for and in payment of an assignment to them of a governmental contract for carrying the mails, over a route which was, under the existing law, liable at any time to be cut down by the government, with a corresponding reduction of the amount to be paid. The route was cut down, after the assignment, and a corresponding reduction made in the amount of money paid under the mail contract. *Held*, in an action on said note, that the cutting down of the route, and the reduction of the amount paid, did not constitute a partial failure of consideration for the note; and that in the absence of such provision in the written contract for the assignment, parol evidence was inadmissible to show a verbal agreement, at the time the contract was made, whereby the defendants were to be liable, on their note, only for the portion of the route that was continued.

BEFORE SAWYER, circuit judge.

Pillsbury & Blanding, for the plaintiff.

William Matthews, for the defendant.

SAWYER, CIRCUIT JUDGE. This is an action on a note payable in sixteen installments. The note was given on June 30, 1882. The contract, in pursuance of which it was executed, was made on May 7, 1882. The defense set up, and attempted to be established, is a failure, or partial failure, of consideration.

In May, 1882, the Telegraph Stage Company sold all its stock and material to the defendants, and also assigned a contract with the government for carrying the mails from Santa Barbara to Soledad, and, for that portion of the consideration arising from an assignment of the contract, the defendants were to pay the sum of twelve thousand dollars in sixteen installments.

Another portion was to be paid for the stock. This suit is on the note, which was given in pursuance of the agreement for the assignment of the contract for carrying the mails. Under the contract for carrying the mails, the carriers were liable to have the route cut down by the government, with a corresponding reduction of the amount to be paid. Such was the law at that time, in view of which the contract was made. The parties, assignors and defendants, were all aware of that fact. The government could cut off any portion of the route. It did reduce the route some sixty miles, after

the assignment, and made a corresponding reduction in the amount of money paid. It is alleged, that there was, in consequence, a part failure of consideration, and that the defendants can only be called upon to pay on their note, for the portion of the route that was continued, and, it is alleged, that there was a verbal understanding at the time the contract was made, that such should be the case. The written contract, however, does not say anything of the kind. The contract, for which the note was afterward substituted, was made on May 7, and is as follows: "It is hereby agreed and understood between I. E. Haskell, superintendent of the Telegraph State Company, and Wm. H. Taylor, superintendent of Coast Line State Company, each authorized and acting for their respective companies, that in consideration of the sale of certain stage property, between Santa Barbara and San Luis Obispo, California (more fully described in an article of bargain and sale between the parties to the foregoing, of this date), and the transfer by C. H. Cotter of the Telegraph Stage Co., the mail contract between Santa Barbara and Soledad, California, from July 1st, 1882, until June 30th, 1886, to the said Coast Line Stage Co. The said Coast Line Stage Co., by their agent, W. H. Taylor, bind themselves to pay to the said A. E. Haskell of the Telegraph Stage Co., the sum of twelve thousand dollars, to be divded into sixteen payments, of seven hundred and fifty dollars each, the first payment to be made on December 10th, 1882, and the same amount (seven hundred and fifty dollars), to be paid every three months thereafter until the whole is paid. This memorandum to be void after transfer of said mail contract and other arrangements made necessary to the full completion of the foregoing agreement."

This is the contract, as reduced to writing at the time, which provides that twelve thousand dollars are to be paid, and nothing is said about any deduction to be made, in case the distance should be cut down by the government. The note was executed, in pursuance of the agreement, subsequently, on June 30, on the transfer of the property, when the transaction was completed, and no deduction is provided for in the note upon the curtailment of the route. Mr. Taylor testifies, that at the time of the making of the contract, it was agreed between him and Haskell, that if the route should be razeed so as to cut off a portion, there should be a proportionate reduction of the amount to be paid for the assignment. The contract being in writing, I am inclined to think, that this fact, if it be a fact, could not be given in evidence. It would contradict a written contract by parol evidence. If it were admissible, Mr. Haskell testifies, directly, and, positively, to the contrary. He said no such agreement was made by him. He denies it point blank. Mr. Taylor, himself, does not profess to have been present, when the note was given, and he admits that he was not. Mr. Haskell and Mr. Cotter both testify, that there was nothing whatever said about razeeing, or cutting down the route at that time. At that interview four of the parties were present, two on each side. Buckley and

Carr representing the parties giving the note, and Cotter and Haskell representing the other parties. Both Cotter and Haskell say, that, at that time, nothing was said about the matter, and Buckley and Carr are not put on the stand at all, so there is no testimony on that side as to what took place at the time of the making of the note. Neither the contract nor the note says anything about deduction, and, at the making of the note nothing was said about it. All who testify, for plaintiff say, that, they never heard of any such qualification of this contract as is now set up. There is no evidence except Taylor's to show anything of the kind, and the positive testimony of two witnesses is in harmony with the written contracts to the contrary. As to what took place at the making of the contract the testimony is directly contradictory, and Haskell's statement is positive. The fact that it was not mentioned in the written contract is confirmatory of his statement. Admitting that the testimony is admissible, but I think it is not, still the defense is not made out.

Aside from a failure of proof on this point, defendants seem to rely on the fact, that there is a partial failure of consideration. But there is no failure of consideration. Defendants simply took an assignment of that contract, knowing that the distance, as is the case in all government mail contracts, was liable to be cut down. The contractors transferred all they could transfer—all their rights under the contract. They assigned the contract as it was, and all there was in them to assign. The defendants got all they purchased, all that was assigned, all that could be assigned. They got the entire contract as it was. They stepped into the assignors' shoes, knowing that a portion of the route was liable to be cut off—knowing exactly what they bought. Under the law, it was well known that the government was entitled, at any time, to cut off a portion of the route. It was one of the terms of the contract, express or implied, that it might be cut down, and the parties got an assignment of all they purchased, with full knowledge of the terms of the contract. The defense is, therefore, not sustained, and there must be judgment for the complainant. There will be a finding for the installments due, and the interest due thereon. There was an attempt to show that part payment had been accepted, as a full payment of all that was due, recognizing the agreement set up. The evidence satisfies me that there was no such acceptance. The receipt was on account, by parties who knew nothing about the agreement at the time, and they promptly repudiated any such agreement. The payments were received on account, and never accepted as full payment. There will be a general finding drawn in favor of the plaintiff for the amount due and unpaid, and the interest.

WELLS, FARGO & CO. *v.* MINER ET AL.

November 9, 1885.

UNITED STATES COURTS OF EQUITY—STATE STATUTES ENLARGING EQUITABLE RIGHTS APPLICABLE TO.—A state statute merely regulating procedure is not applicable to United States courts of equity. But, where a state statute enlarges a party's equitable rights, by creating a new remedy, under given circumstances, such equitable rights may be enforced in the United States circuit court.

THE SAME—CALIFORNIA STATUTE ENLARGING RIGHT OF INTERPLEADER.—Section 386 of the California code of civil procedure provides that "whenever conflicting claims are, or may be made, upon a person for, or relating to, personal property, or the performance of an obligation, or any portion thereof, such person may bring an action against the conflicting claimants to compel them to interplead, and litigate their several claims among themselves. The order of substitution may be made, and the action of interpleader may be maintained, and the applicant, or plaintiff, be discharged from liability to all or any of the conflicting claimants, *although their titles or claims have not a common origin, or are not identical, but are adverse to and independent of one another.*" *Held*, that such provision was not a mere regulation of procedure; that it creates a new right by enlarging the scope of the remedy; and that the right to interplead adverse claimants, so created, might be enforced in equity in the United States circuit court.

THE SAME—INTERPLEADER UNDER ORIGINAL CHANCERY PRACTICE—CASE IN JUDGMENT.—The defendant S. sold a mining claim to the defendant, the S. D. Co., for ten thousand dollars, and received in payment a check for that amount on the Bank of California. S. deposited the check with the complainant, who, thereupon, paid him two thousand five hundred dollars, and issued to him a certificate of deposit for seven thousand five hundred dollars, payable to him "or order, on return of this certificate properly indorsed." By *mesne* assignments before maturity, the certificate came into possession of defendant M., who claims to be the owner and holder thereof, but he is alleged not to be a holder in good faith. The S. D. Co., claims, that, in the sale of the mine, S. made certain false and fraudulent representations, by reason whereof they are entitled to rescind the sale, and recover back everything of value which they paid to S. The defendants, M. and S. D. Co., have each sued the complainant, the former to recover on the certificate of deposit, and the latter to enjoin its payment, until the determination of a suit, brought by them to rescind the sale. The complainant, thereupon brought the present suit in equity to compel the defendants to interplead, and to restrain the prosecution of the actions against them respecting the certificate, until the determination of the present suit. *Held*, that the case is a proper one for an interpleader, under section 386 of the code of procedure of California, and intimated that under the chancery practice, as it originally existed before the enlargement of the scope of the remedy by said section, the complainant was entitled to interplead the defendants, because the same thing—the certificate of deposit—was claimed by both the S. D. Co. and M.; their claims being derived from a common source—the original transaction between the S. D. Co. and S.; and the complainant claiming no interest against, and having incurred no independent liability to either of the defendants.

BEFORE SAWYER, circuit judge.

Pillsbury & Blanding, for the complainants.

Langhorne & Miller, for the defendants.

SAWYER, CIRCUIT JUDGE. This is an application for a preliminary injunction, in a suit on the equity side of the court, brought by the banking house of Wells, Fargo & Co., against Richard S. Miner, Frank Silva, and the Southern Development Company of Nevada, to compel them to interplead with one another respecting a certain certificate of deposit for seven thousand five hundred dollars, which was issued by complainant to defendant, Silva. From the papers used on the hearing, it appears that Silva sold a mining claim to the Southern Development Company, for an agreed price, of ten thousand dollars, and received in payment a check for that amount on the Bank of California. Silva deposited the check with the banking house of Wells, Fargo & Co., who, thereupon, paid him two thousand five hundred dollars in coin, and issued to him a cer-

tificate of deposit for seven thousand five hundred dollars, "payable to Frank Silva, or order, on return of this certificate properly endorsed." By *mesne* assignments, before maturity, title to the certificate became vested in defendant, Miner, who now claims to be the owner and holder thereof, but he is alleged by the Southern Development Co. not to be a holder in good faith. The Southern Development Co. claims, that in the sale of the mine, Silva made certain false and fraudulent representations as to its character and value upon which it relied, and by reason thereof, it is entitled to rescind the sale, and recover back everything of value which it paid to Silva. Accordingly, before any presentation of said certificate for payment, the Southern Development Company notified Wells, Fargo & Co., that the check on the Bank of California, had been obtained by Silva by means of fraud, misrepresentation and deceit, and, that it claimed the certificate in question, and warned them not to pay it to Silva. The Southern Development Company, then caused Silva to be arrested and prosecuted on the criminal charge of obtaining money under false pretenses; but the jury disagreed on the trial, and, thereupon, the district attorney dismissed the information, and the prisoner was discharged. The Southern Development Company then, brought a civil action against Silva, which is now pending in this court, to recover fifteen thousand dollars damages, alleged to have been suffered by reason of the fraudulent misrepresentations aforesaid, of which suit it notified complainant. It, also, brought suit against Wells, Fargo & Co., in which neither Silva nor Miner was made a party, to enjoin the payment of the certificate, until the determination of the aforesaid action against Silva for fifteen thousand dollars damages. In this suit, Wells, Fargo & Co., suffered a default, and judgment was rendered against them according to the prayer of the complaint. At this point, Miner presented the certificate to Wells, Fargo & Co. for payment, which was refused on the ground that they had been enjoined, and, thereupon, Miner instituted an action at law on the certificate against Wells, Fargo & Co., in this court. They appeared in that action, and made a motion, under section 386 of the code of civil procedure of California, that the Southern Development Company be substituted in their place and stead, as defendant. This motion was argued elaborately, and denied by the district judge of Nevada, holding the circuit court, on the ground that an equitable cause of suit could not be thus injected into an action at law in the United States courts. Thereupon, Wells, Fargo & Co. instituted the present suit in equity, to compel the defendants to interplead, and they now move for a preliminary injunction, restraining the prosecution of the actions against them respecting the certificate until the determination of the rights of the parties upon an interpleader. They offer to pay the money into court for the benefit of the party, who shall be adjudged entitled to it.

The defendant, Silva, disclaims all interest in the subject matter. The Southern Development Company makes no opposition to the

motion, and Miner opposes it, on the ground that it is not a proper case for an interpleader.

The question as to whether this is a proper case for an interpleader has been very elaborately argued. There are about four hundred pages of printed arguments, and a very extensive collection, and careful analysis of the authorities, showing the different circumstances under which interpleaders have been denied, and wherein they have been allowed, in courts of equity. This is a motion for an injunction to restrain the prosecution of those suits, until the determination of the rights of the parties on the bill for interpleader. The defendants do not deny that the complainants are entitled to the injunction, provided the case is a proper one for a bill of interpleader. They say it is not within the class of cases, in which courts of equity, under the chancery practice, as it, heretofore, existed, and under the law of England, have interfered. Conceding defendants to be right on this proposition, it is still, in my judgment, within one of the provisions of the code of civil procedure of the state of California, provided that provision is applicable. Section 386, among other things, provides as follows:

"And whenever conflicting claims are, or may be made, upon a person for, or relating to, personal property, or the performance of an obligation, or any portion thereof, such person may bring an action against the conflicting claimants to compel them to interplead, and litigate their several claims among themselves. The order of substitution may be made, and the action of interpleader may be maintained, and the applicant, or plaintiff, be discharged from liability to all, or any of the conflicting claimants, *although their titles or claims have not a common origin, or are not identical, but are adverse to, and independent of, one another.*"

The contention here is, that these claims have not a common origin, are not identical, that there is an independent claim, and, therefore, that they are not within the original chancery jurisdiction. If this clause be applicable, and can be acted upon in this court, it abolishes the distinction resting upon these elements. It is insisted on the part of the defendant, here, that the statute cited is not applicable to the United States courts of equity, as the code of procedure does not apply on the equity side of the courts. If it were merely a provision regulating procedure, undoubtedly, it would be so, but I think it is more than that. It gives a right to a party in equity. It enlarges his equitable rights—it enlarges the scope of his remedy. It is not a question of enlarging the jurisdiction of the court. It gives a new remedy—a new right in the form of a remedy. I think it is within the rule as established by the supreme court of the United States in the Broderick will case, which was an appeal from this court. In that case, there was a bill filed to set aside and vacate the will, and the probate of the will of Broderick. This court dismissed the bill. The case went to the United States supreme court on appeal; and, in deciding the case, the supreme court says:

"It is undoubtedly the general rule, established *both in England, and in his country*, that a court of equity will not entertain jurisdiction of a bill to set aside a will, or the probate thereof."

Then, in commenting on the statute of California of 1862, which, in the district court of the state, gave the new remedy, the court says:

"The statute of 1862, has been referred to, which gives the district courts of California power to set aside a will obtained by fraud or undue influence, or a forged will, and any probate obtained by fraud, concealment or perjury. Whilst it is true, that alterations of jurisdiction of the state courts cannot effect the equitable jurisdiction of the courts of the United States, so long as the equitable rights themselves remain, *yet an enlargement of equitable rights may be administered by the circuit courts, as well as by the state courts. And this is probably a case in which an enlargement of equitable rights is effected, although presented in the form of remedial proceedings*:" Broderick's Will, 21 Wall., 519–20.

In that case, then, the court suggests, that new equitable rights granted by statute of the state may be enforced in the circuit courts of the United States, but affirms the decree of the court below, on the statute of limitations.

In Ohio, an act was passed authorizing the restraining of the collection of taxes, which was a remedy that did not before exist under the circumstances provided for, in courts of equity. A case went to the supreme court of the United States from Ohio, arising under that statute, and the court says in regard to it:

"Though we have, repeatedly, decided in this court that the statute of a state cannot control the *mode of procedure in equity cases in the federal courts*, nor deprive them of their separate equity jurisdiction; we have also held, that, where a statute of a state *conferred a new right, or provided a new remedy, the federal courts will enforce that right*, either on the common law *or equity side*, of its docket, as the nature of the new right, or the new remedy requires: Van Norden v. Morton, 99 U. S., 378:" Cummings v. National Bank, 101 U. S., 157.

In the case of Curtis v. Sutter, 15 Cal., 262, the statute provided under the old practice act of California, then section 254, that a party in possession of land might bring a suit against a party out of possession setting up an adverse title, to determine that adverse claim. It was held in Curtis v. Sutter that this provision gave a new remedy—that it enlarged the scope of the remedy, and to that extent gave a new right in equity. That right did not exist before. Under the statutes of Nevada there is a similar provision. A suit was brought there to determine the adverse claim in the case of Dyer v. The Central Pacific Railroad Company, 1 Sawyer, 649. The question arose whether the United States circuit court could administer that remedy—it being a new remedy. Mr. Justice Field, in commenting on the statute, said:

"The statute, it is true, enlarges the class of cases in which jurisdiction was formerly exercised in quieting the titles and possession of real property. It dispenses with the necessity of a previous establishment of the right of plaintiff by repeated judgments in his favor in actions at law. To that extent, it confers upon the possessor of real property a *new right*,—one that enables him without the delay of previous proceedings at law, to draw to himself, all outstanding inferior claims. That *right the national courts will enforce in the same manner in which they will enforce other equitable rights of parties.*" Citing Clark v. Smith, 13 Peters, 203. Those rights have been enforced repeatedly in the supreme court of the United States, and the doctrine is now recognized in numerous cases, as in Holland v. Challen, 110 U. S., 16, and Reynolds v. Crawfordshire Bank, 112 U. S., 405. In the last case the right was extended by state statute still further. It was extended to the party out of possession as does the present statute of California. And the remedy, was, also, extended to the cancellation of a deed void on its face, for which there was before no remedy in equity. The supreme court held, that the party out of possession could maintain that suit in equity to cancel a deed void on its face in the United States court. Chapman v. Brewer, 114 U. S., 170–1; Cummings v. The National Bank, 101 U. S., 157; Van Norden v. Morton, 99 U. S., 378, cases to which I have already called attention, and Ellis v. Davis, 109 U. S., 485, establish this doctrine. The right here is precisely analogous to those. The statute gives a new right, and if this case does not come within the rule before established by courts of chancery in regard to the points made, I think, under the statute, the remedy is so enlarged as to cover the case, and as it now stands, the right can be enforced in a court of equity of the United States. The statute gives a new right,—an enlargement of the scope of the remedy; and it being a case, peculiarly, of equitable cognizance, it can be enforced on the equity side of the court.

Professor Pomeroy regards the remedy as being enlarged by the statute, and, under the authorities, that it will be enforced by courts of equity. He comments upon the statute in the notes to section 1,324, 3 Pomeroy's Equity.

I am, by no means, certain, that the case is not one for interpleader, under the chancery practice as it, originally, existed before the enlargement of the scope of the remedy by statutory provisions. These are the elements laid down by Professor Pomeroy in his equity jurisprudence, required to justify an interpleader.

"1. The same thing, debt or duty, must be claimed by both." Both the Southern Development Company and Miner, claim to be entitled to the certificate of deposit in question, and to receive the money that is due upon it.

"2. All adverse titles or claims must be dependent, or derived from a common source." These claims all come from the same source—the original transaction between the Development Company and Silva—the rights of all depend upon the acts of Silva

—and upon the acts of complainant dependent upon the acts of Silva. The Development Company claims, that Silva obtained from it the ten thousand dollar check on the Bank of California, by fraud, misrepresentation, and deceit, and, therefore, that the transaction is void, and that the party giving the check is entitled to it. Had Silva never parted with the check and the contest been between him and the drawer, can there be a doubt, that the claims would have come from a common source? If not, can passing the check to another, with notice, change the character of the act in this respect? Silva, simply, changed the check into a certificate of deposit amounting to seven thousand five hundred dollars, substituting one for the other, thereby not only committing a fraud on the Development Company, if it be a fraud, but also, on Wells, Fargo & Co., in obtaining the certificate of deposit. Miner is simply a claimant under Silva, and the latter only substituted one party, who is claimed not to be an innocent assignee, in the transaction, for another, and one commercial instrument for another. They all, therefore, claim from the same source, and all the claims arise out of and are dependent upon the same act.

"3. Complainant seeking relief must not have, or claim, any interest in the subject matter."

The complainants in this case claim no interest against either. They are ready to pay the money into court for the benefit of the party entitled to it. They stand neutral between the two parties.

"4. He must have incurred no independent liability to either of the claimants, that is, he must stand perfectly indifferent between them in the position purely as stakeholder."

I do not see how claimants stand in any other than a dependent position. Because they have issued a certificate of deposit it is claimed that they have entered into an independent contract. How independent? As the case now stands, they are liable only on the certificate. There is but one liability, and that is on the certificate. No party is entitled to recover against them without returning that certificate, properly endorsed. Should they pay the money to Miner, and it turn out, that he is not entitled to receive it, they might be liable to complainant, but, the liability would rest upon different grounds. Those grounds do not now exist, and, there is at this time, but one cause of action, and that is on the certificate. The only question, then, is, who is the owner of that certificate? The contest is, as to this specific thing—this piece of commercial paper. There is no liability independent of that certificate. They are, now, liable on that and on nothing else. How can this be an independent liability in the sense of the rule? It is true, Wells, Fargo & Co., became debtors, but, only on the certificate. As before said, no recovery can be had against them except upon this certificate of deposit. The title to the certificate of deposit, is in issue here, between these parties, and it is the only issue. The Development Company claim that they own it, by reason of the fact that it was obtained from them by fraud, and Miner claims that he owns it,

either because there was no fraud, or if there was, because he is a *bona fide* holder for value without notice of the fraud. Complainants are not liable to both. It is a mere question as to who owns that certificate of deposit. That is the question at issue. And it is a matter of entire indifference to complainants which owns it. They are mere stake holders. That question the claimants ought to litigate between themselves. The adverse claimants are the only ones to blame, for the dilemma in which complainants are placed, and they ought to assume the burden of relieving complainants from the dilemma.

The defendants are liable on that certificate either to the Development Company, or to Miner. They are not liable to both. They do not know which. That is the very thing to be ascertained. The doctrine relied on to deny an interpleader is that announced in Crawshay v. Thornton, 2 Mylne & C., 1, an English case, decided before the present system of practice in England went into effect. It is very doubtful, in my mind, whether that doctrine would be sustained, at this time, even in England. The observations of a number of English judges made, subsequently, to the decision of that case, and to the change of the law by statute, indicate that they repudiate the doctrine there announced, and regard the grounds on which the distinction is rested as being very narrow. The act of 1860, in England, like the provisions of the California code of procedure, which I have just read, has abolished the distinction taken in that case. The provision is similar to our statute. I presume our statute was adopted from the English act of 1860. I should be very much disposed to hold the case to be a proper one for interpleader, even if it stood on the ordinary principles of equity jurisprudence alone, without the aid of this act enlarging the equitable rights of parties in such cases. At all events, I am satisfied that, by this act, a new right was created broad enough to reach the case, which can been forced in this court.

I am satisfied, therefore, that it is a proper case for a bill of interpleader, and that the injunction should be granted. The motion is granted, on giving security in the sum of ten thousand dollars.

CIRCUIT COURT, DISTRICT OF OREGON.

THOMPSON, RECEIVER, v. THE PHŒNIX INSURANCE COMPANY.

November 8, 1886.

LIMITATION ON RIGHT TO SUE ON A POLICY OF INSURANCE.—A policy of insurance contained in effect, this stipulation: (1.) No action shall be commenced thereon to recover for a loss thereunder until the amount thereof was ascertained by agreement or arbitration; and (2.) No such action shall be maintained unless commenced within one year after the date of the fire from which the loss occurred. *Held*, That unless the assured was prevented by the action or non action of the insurer, in the matter of ascertaining the amount of the loss, he must commence his action therefor within the time specified in the stipulation.

REFORMATION OF POLICY.—A demurrer to a bill for the reformation of a policy of insurance will be sustained, when it appears that by reason of the lapse of time, no action can be maintained thereon for any cause, when reformed. A court will only decree the reformation of an instrument as a means of enabling a party thereto to assert or maintain some right thereunder.

SUIT to reform a policy of insurance. The opinion states the facts.

Henry Ach, for the plaintiff.

P. L. Willis and *Milton Smith*, for the defendant.

DEADY, J. On April 21, 1884, the defendant, in consideration of the sum of three hundred dollars paid to it by E. S. Kearney, insured him, as "Receiver for Holladay v. Holladay," in the sum of five thousand dollars against loss or damage by fire on a half interest in the Clarendon hotel and furniture, for the term of one year from April 27; and on the night of May 19, 1884, the property was destroyed by fire.

This suit was brought on July 10, 1885, to reform the policy by the plaintiff, as the successor of Kearney in said receivership.

The bill alleges that by mistake the policy was made payable to said Kearney "instead of the receiver in said suit of Holladay v. Holladay, and his successors and for the benefit of whom it might concern;" and prays that it may be reformed by adding therein, after the words "E. S. Kearney," the words "as receiver in the suit of Benjamin Holladay against Joseph Holladay, for and on account of his successors, as such receiver, and for the benefit of whom it might concern;" and that "the sum so insured by said defendant on said building and furniture be paid to your orator accordingly."

The defendant demurs to the bill, and for cause of demurrer, assigns, among others, the following: "The plaintiff's right is barred, because he did not commence this suit within twelve months next after the date of the fire from which the loss occurred."

The policy contains a stipulation, to the effect, that a loss arising thereunder is not payable until the proof thereof is furnished, and in case of arbitration, the award fixing the amount thereof is had; and also this:

"It is furthermore hereby expressly provided and mutually agreed, that no suit or action against this company, for the recovery of any claim by virtue of this policy, shall be maintainable in any court of law or chancery, until after an award shall be obtained fixing the

amount of such claim in the manner above provided, nor unless such suit or action shall be commenced within twelve months next after the date of the fire from which such loss shall occur; and should any suit or action be commenced against this company, after the expiration of the aforesaid twelve months, the lapse of time shall be taken and deemed as conclusive evidence against the validity of such claim, any statute of limitation to the contrary notwithstanding."

There is no claim that the right to bring this suit has been delayed over a year from the date of the fire from which the loss occurred, by any dispute concerning the value of the property destroyed. On the contrary, it appears from the bill that the proof of the loss was duly made, and that the amount of is not contested, but that the payment thereof is refused to the plaintiff solely on the ground that by the terms of the policy it is payable to Kearney only.

Therefore, the question does not arise in this case, whether an action could be maintained on this policy by the assured, after the expiration of a year from the date of the fire, in case he had been delayed in the commencement of the same, on account of a dispute and arbitration concerning the amount of the loss.

Cases may arise under such a policy, when the dispute and arbitration are, without any fault of the assured, so prolonged, that, unless he is allowed to commence an action after the expiration of a year from the date of the fire, he would, under the combined operation of these two stipulations, be deprived of all legal remedy.

But, in this case, the suit was not brought until thirteen months and twenty-one days after the fire at which the loss occurred, and no excuse or reason is given for the delay.

It is well established that a stipulation limiting the time within which an action may be brought on a policy of insurance is valid and binding on the parties thereto; but that if it is ambiguous, either in itself or taken in connection with other provisions or stipulations in the policy, the ambiguity must be resolved in favor of the assured. See Spare v. Home Mutual Insurance Company, 9 Saw., 145, and cases there cited.

The stipulation for limitation in this policy is, considered by itself, plain and susceptible of but one meaning; and putting aside the provision concerning an award as inapplicable in this instance, there is nothing in the policy to qualify or render it doubtful.

Unlike the stipulation in Spare v. Home Mutual Insurance Company, *supra*, in which the right to sue was limited to one year from the time the loss "occurred," which, in conjunction with the sixty days also allowed the company to ascertain whether any loss had "occurred," and make payment thereof, was held to mean one year from the expiration of said sixty days, the limitation in this case is a year from a day certain, to wit: the day of the fire. And unless the assured is prevented by the action or non-action of the company in the matter of ascertaining the amount of the loss, from commenc-

ing an action within that time, he must do so or he will be barred therefrom.

But it is said that this is a suit to reform this contract, as well as to enforce it, and that the stipulation as to the time does not apply to a suit for such relief, and, therefore, the demurrer is too broad and must be overruled.

But the court will not reform an instrument, merely for the sake of reforming it, but only to enable a party to assert some right thereunder. And if an action thereon by the assured to recover the amount of loss is already barred by lapse of time, there is no claim that can be asserted under it against the defendant.

In Davidson v. Phœnix Insurance Company, 14 Saw., 594, Mr. Justice Field held, in a case like this, that when the remedy on the policy for the insurance was barred, according to the stipulation therein, by lapse of time, the court would not undertake to reform the instrument, because there was "no occasion" for so doing.

This conclusion is not reached without reluctance. So far as appears, there is, in good morals, no sufficient reason why the defendant should not pay this claim according to the real intention of the parties to the contract—that is, to the receiver for the time being in the case of Holladay v. Holladay, for the benefit of whom it may concern. Such cases as this suggest the necessity of some legislation simplifying the contract of insurance, and within certain limits, declaring its effect; and in case of loss, who may claim the benefit of it, and maintain an action against the insurer to enforce it.

But, as it is, the parties to this contract have deliberately agreed, that unless the assured brings his action to recover for the loss within a year from the date of the fire, he is forever barred from so doing, and the court cannot disregard the stipulation.

Nor is it intended to suggest that this limitation of the time in which to sue is either unwise or unjust. In this class of cases especially, every consideration of justice and convenience require that claims for losses should be speedily settled, while the witnesses are within reach and the facts are fresh in their recollection.

But the law should have come to the aid of this defective contract and authorized the plaintiff to maintain an action thereon to recover this loss, as the successor in office of the person who effected the insurance, for the benefit of whom it might concern, without any reformation of the instrument, or delay on that account.

The demurrer is sustained and the bill dismissed.

SUPREME COURT OF CALIFORNIA.

No. 11,151.

IN RE GUARDIANSHIP OF LAURA DANNEKER, A MINOR.

Department Two. Filed November 17, 1885.

GUARDIANSHIP OF MINOR—JURISDICTION OF SUPERIOR COURT TO HEAR PETITION FOR.—Where a petition for letters of guardianship over the person of a minor is presented and filed in the superior court of one county, and citation is issued and served on the parties interested, such court has jurisdiction to hear and determine whether the minor is a resident of that county and whether the petitioner is a proper person to be appointed guardian. Its jurisdiction, so to proceed, is not ousted by the fact, that subsequent to the service of the citation, the party served obtained the issuance of letters of guardianship to himself in the superior court of another county.

PETITION for a writ of prohibition. The opinion states the facts.

Charles P. Goff and *Robert Ferral*, for the petitioner.

A. H. Loughborough, for the respondent.

MYRICK, J. Application for a writ of prohibition to the superior court of the city and county of San Francisco, department 9.

On the nineteenth of June, 1885, one Teresa McGee presented her petition to the said superior court of the city and county of San Francisco, in which she averred that some six years ago Mrs. Danneker, a widow, the mother of the said Laura, placed the child under her care as superioress of St. Joseph's Orphan Asylum, in said city and county; that afterwards the mother died, leaving no estate except one hundred and seventy dollars, which had been expended in the maintenance of said Laura and two other of her minor children; that after the death of the mother the petitioner placed the said Laura under the care of a Mrs. Trendle, who agreed to support and raise her under her personal care; that afterward Mrs. Trendle, without the knowledge of petitioner, gave the custody of the child to Jacob Michelson, who had ever since had the custody of her, and that she was then at a boarding school in Alameda county kept by Mrs. Kegler; that said child was then nine years of age, a full orphan, and had no property and no guardian; that said Michelson and Mrs. Trendle and the said child were residents of said city and county, though the child was temporarily at a school in Alameda county, and the petitioner prayed that letters of guardianship be issued to her.

The superior court made an order that citation issue, returnable June 30, and that it be served on the said minor and on Jacob Michelson, Mrs. Trendle and Mrs. Kegler. The citation was duly served.

After the service of the citation, and on the twenty-third of June, the return day of the citation being June 30, the said Michelson presented a petition to one of the judges of the superior court of Alameda county, in which he averred that said minor was a resident of Alameda county, under the care of Mrs. Kegler, and had no guardian, and prayed for letters of guardianship. The petition was signed by said Michelson and C. P. Goff as his attorney. In this petition no

mention was made of the proceedings in the superior court of the city and county of San Francisco, and the judge in Alameda county, not being informed thereof, made an order for service of citation on Mrs. Kegler and Mrs. Trendle. On the return day, to wit, June 29—after hearing evidence offered by Michelson, the court found that the minor resided in Alameda county and granted the prayer of the petition of Michelson for letters. On the return day of the citation in the superior court of the city and county of San Francisco—to wit, June 30—the said Michelson, by his attorney, filed objections to the petition of the said Teresa McGee, and the hearing was postponed until July 14, on which day the said Michelson, by his said attorney, presented a certified copy of the proceedings in the superior court of Alameda county, and moved that the petition of said Teresa McGee be dismissed on the ground that the court had no jurisdiction, letters having been already granted to him by the superior court of Alameda county. Further hearing was continued to July 23, and before that day an alternative writ of prohibition herein was granted and an order to show cause made.

There is no doubt that at the time the said Teresa McGee presented her petition to the superior court of the city and county of San Francisco, and citation was served on Michelson and the others, that court had jurisdiction to hear and determine whether the minor was a resident of that city and county, and required a guardian, and whether the said Teresa was a proper person to be appointed. The question, then, is presented, could Michelson (instead of presenting the issue of residence and the other subjects involved, to the superior court of the city and county of San Francisco) step over to Alameda county, obtain letters there, and thus oust the former court of jurisdiction to proceed? We think not. It is proper to presume that the superior court of Alameda county will, when its attention is brought to the fact that a petition was first filed in the city and county of San Francisco, revoke its order of appointment and recall its letters, to the end that there may be no conflict of jurisdiction. It is apparent there cannot be two guardianships in two different courts at the same time. Letters will be issued, if necessary, by the court of the county where it may be legally determined the child resides.

Further than this, it is not necessary to go at the present time, except to suggest if Mr. Michelson and his attorney, C. P. Goff, did, as is stated in some of the papers herein, resort to the court in Alameda county for letters, instead of meeting the question in the court in San Francisco, as a trick, it was a hazardous proceeding; for, as to Mr. Michelson, by section 1,209, code of civil procedure, it is declared to be a contempt to practice "deceit or abuse of the process or proceedings of the court by a party to an action or special proceeding;" and, as to Mr. Goff, by section 282, code of civil procedure, he was forbidden to seek to mislead a judge by artifice.

We do not intend to prejudge the proceedings taken by either one; we desire merely to call attention to the risk that may have been

run. When Mr. Michelson filed his petition in Alameda county he had already been served with citation to appear before the superior court of the city and county of San Francisco, which court then had, as to him, jurisdiction to hear and determine.

The application for the writ is denied, and the order heretofore made is vacated.

THORNTON, J., and MORRISON, C. J., concurred.

No. 8,791.

DENT *v.* BIRD ET AL.

Department One. Filed November 19, 1885.

DEED—ADMISSIBILITY OF—WHETHER INCLUDES PREMISES IN DISPUTE.—When a deed is offered in evidence to show title to the *locus in quo*, an offer by the adverse party to prove facts showing that such deed was not intended to include the premises in dispute, does not go to the admissibility of such deed, but only to its effect.

THE SAME—CANNOT BE VARIED BY PAROL EVIDENCE—CONSTRUCTION.—Parol evidence is never permitted to vary or contradict the terms of a written instrument. While evidence is admissible of all the circumstances surrounding the maker of the instrument, parol evidence of other language, declaring his meaning, than that which is contained in the instrument itself, is not admissible. If, therefore, the language of a deed in question is unambiguous, and admits of but one construction, no parol evidence could be material to its construction, and the rejection of evidence offered for such purpose would not be error.

THE SAME—EVIDENCE OF GRANTOR'S INTENTION NOT ADMISSIBLE.—Where a deed is silent as to the quantity of land intended to be conveyed, and the description is broad enough to include both high lands and adjoining marsh lands, parol evidence that it was the intention of the grantor to exclude such marsh lands, and to limit the conveyance to a specified number of acres, is inadmissible.

APPEAL from a judgment of the superior court of Alameda county, entered in favor of the defendants, and from an order denying the plaintiff a new trial. The opinion states the facts.

George W. Tyler and *John T. Humphries*, for the appellant.

B. S. Brooks, Geo. Leviston, Mastick, Belcher & Mastick and *Greathouse & Blanding*, for the respondents.

ROSS, J. The subject of this controversy is a part of that portion of the rancho San Antonio, situated in what is now the county of Alameda, which was confirmed and patented by the United States government to Antonio Maria Peralta, under whom both plaintiff and defendants claim title—defendants, through a deed executed by Peralta on the twenty-third of October, 1851, to William A. Chipman and Gideon Aughinbaugh, and plaintiff, by virtue of a deed executed by Peralta on April 8, 1868, to George W. Dent and Thomas Wallace. At the time of the deed to Chipman and Aughinbaugh, Peralta's title rested upon the grant from the Mexican government, but its subsequent confirmation and patent by the government of the United States enured to the benefit of his grantees, and determined as well the validity of the grant as its boundaries. Admitedly, the land in dispute, which is marsh land, is within the patented lines, so that, the real question in the case is whether it falls

within the descriptive calls of the deed to Chipman and Aughinbaugh. The description is: "All that tract or parcel of land situated in the township of San Antonio and in the county of Contra Costa, and known by the name of Bolsa or Peninsula del Encinal, being part of the Rancho de San Antonio, and property of A. M. Peralta, granted, etc. * * * Said Encinal is almost all surrounded by the sea water, having a single entrance or mouth on the northeast side. Said mouth or entrance is to be fenced and gated by said parties of the second part immediately (upon) taking possession, from the point or end of the San Leandro slough, or Estero de San Leandro, to the point or end of San Antonio slough, or Estero de San Antonio, a distance from point to point of about one thousand yards, more or less, and said line for the fence run about three hundred yards from the brickyard house with the purpose of preventing the entrance of the cattle of said A. M. Peralta, and of his heirs, executors or assigns, and for not doing so, said William W. Chipman and G. Aughinbaugh, their heirs or assigns, are bound to pay all damages unto said A. M. Peralta, his heirs, executors or assigns."

Plaintiff's counsel objected to the introduction of this deed when offered by defendants, "upon the ground that it did not include the lands described in the complaint, as by its terms it only purported to convey the part of the bolsa or peninsula covered with oak timber, and in this connection offered to prove the following facts:

"First—That at the time of the execution of the said deed, and prior thereto, it was supposed by the grantor and grantees of said deed that there was about twenty-two hundred acres of high land upon the peninsula.

"Second—That shortly after said deed was executed, the grantees of said deed, in conveying one-fourteenth of their interest, spoke of the amount as one hundred and forty acres of land, more or less.

"Third—That at the time of the execution of said deed, and prior thereto, it was understood by the grantor and grantees of said deed, and by all other persons in the neighborhood, when speaking of the 'Bolsa de Encinal,' that the high land, or land covered with oaks, only was meant, and not the salt marsh or tide lands on the peninsula.

"Fourth—That once in every twenty-four hours, and at high water large, the water of the ocean came up within twenty feet of the line between the firm land and the salt marsh and tide land on the south line of the land described in the complaint, along the line of segregation between the high land and the salt marsh and tide lands of the peninsula, referred to and shown in defendant's Exhibit 'A,' and that has been so at all times, from 1850 down to the present day.

"Fifth—That the high lands on the peninsula, or bolsa, were, at the time of the execution of said deed, excepting a strip along the north side of the high land, of about three hundred feet wide, covered with oak trees, resembling a grove from a distance.

"Sixth—That the high land of the peninsula, at the time of the execution of said deed, was about nineteen hundred and ninety-four acres.

"Seventh—That the whole land on the peninsula, high land and salt marsh and tide land, at that time, was something over three thousand three hundred acres.

"Eighth—That all the land described in the complaint was salt marsh and tide land."

The defendants objected to each and all of the foregoing proofs as offered by plaintiff.

As is well said for respondents, the matters offered to be proved by the plaintiff would not go to the admissibility of the deed, but, at most, to its effect. For this reason the court below was right in overruling the objection to the introduction of the deed.

But treating the offer to prove the matters enumerated as made in rebuttal, the judgment should not be disturbed if the admission of such proof as was offered could not have affected the result. Parol evidence is never permitted to vary or contradict the terms of a written conveyance. While evidence is admissible of all the circumstances surrounding the maker of the instrument, parol evidence of other language, declaring his meaning, than that which is contained in the instrument itself, is not admissible: 1 Greenleaf on Ev., secs. 287-8, 169. If, therefore, the language of the deed in question is unambiguous and admits of but one construction, it is obvious that no parol proof could be material to its construction.

It is said for the plaintiff that the deed by its terms only purported to convey the part of the bolsa or peninsula covered with oak timber. Clearly, this is not so, for the deed in terms declares: "Said encinal [that is, the encinal previously referred to therein as the Bolsa or Peninsula del Encinal] is almost all surrounded by the sea water, having a single entrance or mouth on the northeast side." The grantor having thus expressly declared in his written conveyance that the Bolsa or Peninsula del Encinal "is almost all surrounded by the sea water, having a single entrance on the northeast side," it is very clear that to permit parol proof that at the time of the execution of the instrument he understood, when speaking of the Bolsa del Encinal, "that the high land or land covered with oaks only was meant," would be to permit the written instrument to be varied and contradicted by parol. *A fortiori*, as against the written declaration of the grantor, would the understanding of "all other persons in the neighborhood" be inadmissible.

But the intention of the grantor to convey by the deed all of the Bolsa or Peninsula del Encinal is, if possible, made still more manifest by the further provision contained in the deed that "said mouth or entrance is to be fenced and gated by said parties of the second part immediately (upon) taking possession, from the point or end of the San Leandro slough, or Estero de San Leandro, to the point or end of San Antonio slough, or Estero de San Antonio, a distance from point to point of one thousand yards, more or less, and said line for

the fence (to) run about three hundred yards from the brickyard house, with the purpose of preventing the entrance of the cattle of said A. M. Peralta, and of his heirs, executors or assigns, and, for not doing so, said William W. Chipman and G. Aughinbaugh, their heirs or assigns, are bound to pay all damages," etc.

Nothing can be clearer, we think, from the language of the deed, than that the land conveyed had for its boundaries the sea water and the line about three hundred yards from the brickyard house, and extending from the point or end of the San Leandro slough to the point or end of San Antonio slough.

In respect to the offered proof of quantity, it is sufficient to say the deed contains no mention whatever of the quantity of land in the tract conveyed.

In our opinion, there was no error in the ruling of the court below, and, therefore, the judgment and order are affirmed.

MCKINSTRY, J., and MCKEE, J., concurred.

No. 8,792.

HALL ET AL. v. HEBARD.

Department One. Filed November 19, 1885.

JUDGMENT and order affirmed on the authority of Dent v. Bird, *ante*.

APPEAL from a judgment and order of the superior court of Alameda county. The facts were similar to those of Dent v. Bird, *ante*.

George W. Tyler and *John T. Humphreys*, for the appellant.

B. S. Brooks, George Leviston, Mastick, Belcher & Mastick and *Greathouse & Blanding*, for the respondents.

THE COURT. On the authority of Dent v. Bird, No. 8,791, judgment and order affirmed.

No. 8,816.

LAKE PLEASANTON WATER COMPANY v. CONTRA COSTA WATER COMPANY.

Department One. Filed November 19, 1885.

EMINENT DOMAIN—SUPPLYING WATER TO MUNICIPAL CORPORATION A PUBLIC USE—LAND MAY BE CONDEMNED FOR RESERVOIR.—The supplying of the inhabitants of an incorporated city with pure fresh water, is, under section 1,238 of the code of civil procedure, declared to be a public use, in behalf of which the right of eminent domain may be exercised, and, under section 1,239 of such code, the entire estate, in a given piece of land, may be taken when needed for a reservoir in behalf of such use.

THE SAME—QUESTION AS TO CONFLICTING PUBLIC USES—DEMURRER.—In an action of eminent domain, where the complaint does not show that the land is appropriated to any public use, the question whether the public use, for which the condemnation is sought, is more necessary that the public use to which it has been already appropriated, cannot arise on demurrer to the complaint.

APPEAL from a judgment of the superior court of Alameda county, entered in favor of the defendant. The opinion states the facts.

James E. McElrath, for the appellant.

Fox & Kellogg and *Vrooman & Davis*, for the respondent.

ROSS, J. A demurrer to the amended complaint of the plaintiff having been sustained by the court below, and the plaintiff having declined further to amend, judgment was entered for the defendant, from which the appeal is taken. The action is to condemn certain land of the defendant to be used by the plaintiff for the purpose of a reservoir in which to store water.

It is alleged in the complaint that the plaintiff is a corporation organized and existing under the laws of the state for the purpose of supplying the inhabitants of the cities of San Francisco and Oakland with pure, fresh water, and for the purpose of supplying water for manufacturing and irrigation.

It is contended on behalf of the defendant, that under the provisions of the code of civil procedure, by virtue of which the present proceedings are had, authority is not given to condemn land to be used as a reservoir in which to store or impound water. It is true, as said by counsel, that in the enumeration of the public uses found in section 1,238 of the code of civil procedure, behalf of which it is declared the right of eminent domain may be exercised, the word reservoir is not found, but in classifying the estates and rights in lands subject to be taken for public use, it is provided by section 1,239 of the code, that a fee simple may be taken when needed "for public buildings or grounds, or for permanent buildings, for reservoirs and dams, and permanent flooding occasioned thereby, or for an outlet for a flow, or a place for the deposit of debris or tailings of a mine."

The supplying of the inhabitants of an incorporated city with pure fresh water is, by section 1,238, declared to be a public use, in behalf of which the right of eminent domain may be exercised, and section 1,239 provides in effect that the entire estate, in a given piece of land, may be taken when needed for a reservoir in behalf of such use.

Although the complaint alleges that the defendant is a corporation organized under the laws of the state for the purpose of supplying the city of Oakland and its inhabitants with pure, fresh water, and that defendant is the owner of the property sought to be taken, it is not averred that the property in question is used by defendant in supplying Oakland or its inhabitants with water, or that it is appropriated to any other public use. Therefore, the point made by respondent's counsel that property appropriated to public use cannot be taken unless for a more necessary public use than that to which it has been already appropriated, cannot arise on the demurrer.

Judgment reversed and cause remanded with directions to the court below to overrule the demurrer to the amended complaint, with leave to defendant to answer.

MCKINSTRY, J., and MCKEE, J., concurred.

No. 11,262.

HIRSHFELDT v. CROSS, JUDGE, ETC.

Department One. Filed November 19, 1885.

ACCOUNTING BY ADMINISTRATOR—COURT MAY ORDER SEVERAL ACCOUNTS TO BE COMBINED.—If an account, presented by an administrator, is not sufficiently specific, the superior court, sitting as a court of probate, has power to require the administrator to make it more specific. And if, pending the settlement of such account, the administrator presents a second account, the court may order him to present one account of his administration which shall be full and complete up to the time of its rendition.

APPLICATION for a writ of mandate. The opinion states the facts.

Wal. J. Tuska, for the petitioner.

Stetson & Houghton, for the respondent.

ROSS, J. This is an application for a writ of mandate to compel the respondent to enter an order settling an annual account of the petitioner as administrator of the estate of Allen E. Rose, deceased.

It appears from the papers submitted that the petitioner was appointed administrator of the estate in question by the superior court of Kern county in the year 1880, and in the latter part of the following year filed his first account of his administration. This account was settled by the superior court, and from the order of settlement an appeal was taken to this court by the parties in interest, who were dissatisfied therewith. The appeal being heard, the order was reversed and the cause remanded for further proceedings, which were had in the superior court and which resulted in another order of settlement, from which the contestants again appealed, and on the hearing of which appeal they were again successful—the order being reversed and cause remanded for further proceedings.

After the cause went back the second time it was transferred, by reason of the disqualification of the then superior judge of Kern county, to the superior court of the county of Tulare, of which court the respondent herein is judge. And there the hearing of the account again came up, testimony was taken, and an opinion written and filed by the judge, reviewing the account, and directing an order to be drawn settling the account in accordance with the views expressed in the opinion. The judge's opinion was prepared without the benefit of the brief of the contestants—the latter having failed to reach him through some inadvertence, but subsequently, and before the making of the order settling the account, did do so, and in examining it the judge became satisfied that in some respects the opinion formed by him and expressed in writing was erroneous, and that the account as rendered was not sufficiently specific to enable the court properly to pass upon it. And as, pending the long and necessarily costly litigation over the first account, the administrator had filed a second one which had not been settled nor set down for settlement, and as by reason of errors in the first, a further accounting was necessary, the court entered an order directing the administrator

to present one account of his administration of the estate, which should be full and complete up to the time of its rendition.

We think the court was right. If the first account was not sufficiently specific, the court clearly had the power to require the administrator to make it more specific. The probate court is the guardian of the estates of deceased persons, and has control of the person appointed by it to administer the estate, subject to review as provided by law. It is its duty to require full and fair accounts on the part of administrators, and where the estate is so circumstanced as that one account will result in saving expense, and better and more clearly presenting the accounts of the representative of the estate, it is not only the right, but the duty of the court to require the one account. Of course, upon its settlement, the administrator is entitled to a full hearing, and, if aggrieved by the settlement, has his appeal from the action of the probate court settling the account.

Writ denied and proceedings dismissed.

MCKEE, J., and MCKINSTRY, J., concurred.

No. 8,898.

COMBS *v.* HAWES ET AL.

Department One. Filed November 19, 1886.

DEED GIVEN TO SECURE A DEBT IS A MORTGAGE—FORECLOSURE.—A deed executed to secure the payment to the grantee of money advanced by him in payment of a note of the grantor is, in effect, a mortgage, and must be foreclosed in accordance with section 726 of the code of civil procedure.

THE SAME—GRANTEE HAS LIEN TO EXTENT OF PRIOR MORTGAGES PAID BY HIM.—If, while the legal title so stood apparently in the grantee, he was obliged to protect his security by paying off other mortgages on the land, equity would give him a lien thereon to the extent of such payments.

MINOR OVER EIGHTEEN YEARS—PROMISSORY NOTE—LIABILITY TO ENDORSER—DISAFFIRMANCE OF CONTRACT.—Under section 35 of the civil code, where an infant over the age of eighteen years executes a promissory note, the consideration for which he receives, and upon maturity the note is paid by an endorser, the maker cannot disaffirm his contract with such endorser without refunding to him the amount advanced in taking up the note.

APPEAL from a judgment of the superior court of Lake county, entered in favor of the plaintiff, and from an order denying the defendants a new trial. The opinion states the facts.

J. C. Bates, for the appellants.

E. W. Britt, for the respondent.

MCKINSTRY, J. The action was brought to recover an alleged balance, with interest thereon, averred to have been paid by plaintiff in satisfaction of a certain promissory note made by defendants to the Bank of Lake, which note the plaintiff as endorser thereon was compelled to pay. The complaint avers that defendant, Caroline, "has conveyed to plaintiff in part satisfaction of the amount paid by him" certain real and personal property "of the value of two thousand five hundred dollars," but that the defendants have made no other

payment; leaving due and unpaid the sum of two thousand nine hundred and seventy-five dollars with interest.

The answer of the defendant, Caroline Hawes, denies that the property was conveyed and transferred by her in part payment, but averred the same was conveyed and transferred in full satisfaction of the claim of the plaintiff; and the answer of the defendant Horace is to the same effect, with the additional allegation that when the note was executed he was a minor of the age of eighteen years.

The court below found:

"4. That said defendant Caroline Hawes, has conveyed to plaintiff in part satisfaction of the amount paid by him on said note as alleged in said complaint, the real and personal property referred to in said complaint, of the value of two thousand five hundred dollars. And that such property was not taken or accepted by plaintiff as full satisfaction or payment of the demand in his favor against defendants for re-imbursement of the sums paid by him as aforesaid on said note, and was not accepted by him as payment of said note.

"5. That except by conveyance aforesaid of said real and personal property, the said defendants have not, nor has either of them repaid to plaintiff any part of the sums paid by him on said note."

The testimony of plaintiff is, to the effect, that the conveyance from the defendant Caroline Hawes was to secure the payment of the money by him advanced in payment of the note of the defendants. The plaintiff recognized the continuation of the whole indebtedness from defendants after the deed was executed. If the testimony of the plaintiff is to be believed, the conveyance was neither in payment of part nor of the whole of such indebtedness. The transaction was a contract of mortgage.

Finding No. 4 is therefore not justified by the evidence.

If the facts are as claimed by plaintiff in his testimony he should have filed his complaint for the foreclosure of his mortgage. There can be but one action in such cases, which must be in accordance with the code of civil procedure: Section 726.

If while the legal title stood apparently in plaintiff he was obliged to protect his security by paying off other mortgages on the land, equity would give him a lien thereon to the extent of such payments.

There was evidence to justify the finding of the court that defendant, Horace, with the other defendant, received the benefit of the moneys received from the Bank of Lake. It follows, of course, that he received the benefit of the moneys paid by plaintiff to satisfy the note of defendants. He was eighteen years of age when the note was given. Section 35 of the civil code reads:

"In all cases other than those specified in sections 36 and 37, the contract of a minor, if made whilst he is under the age of eighteen, may be disaffirmed by the minor himself, either before his majority or within a reasonable time afterwards; or, in case of his death within that period, by his heirs or personal representatives; and if the contract be made by the minor whilst he is over the age of eighteen, it may be disaffirmed in like manner upon restoring the

consideration to the party from whom it was received, or paying its equivalent."

The provision of the section which requires the restoration of the consideration to the party from whom it was received as a condition precedent to the disaffirmance of a contract made by an infant over the age of eighteen applies as well to the contract to refund to plaintiff the money advanced by him in taking up the note as to the original contract evidenced by the promissory note.

Judgment and order reversed and cause remanded for further proceedings.

ROSS, J., and MCKEE, J., concurred.

No. 8,658.

TAYLOR *v.* MIDDLETON.

Department One. Filed November 19, 1885.

WHETHER A MINING LOCATION HAD BEEN ABANDONED OR FORFEITED, prior to an attempted subsequent location, is a question for the jury.

MINING CLAIM—BOUNDARIES HOW MARKED—LOCATION.—Whether certain monuments and stakes are a sufficient marking of the location of a mining claim, depends on the condition of the ground to be located. If the conformation of the ground is such that the monument and stakes would so mark the boundaries that they could be readily traced, they are sufficient; otherwise, not. That is a question for the jury.

PLEADINGS—CONSTRUCTION OF—JURY NOT TO FIND ON ADMITTED FACTS.—The construction of pleadings is for the court, and not the jury, and, in an action of ejectment, where the answer admits the ouster, it is error for the court to instruct the jury that the question of ouster was one of the issues to be tried by them.

APPEAL from a judgment of the superior court of Mono county, entered in favor of the defendant, and from an order denying the plaintiff a new trial. The opinion states the facts.

Bennett & Reddy, for the appellant.

Kittrell & Owen and *R. U. Clark*, for the respondent.

ROSS, J. This is an action of ejectment to recover a mining claim. It seems that the ground was originally located by one Neal, and called the Neal mine. The plaintiff claims to have subsequently relocated it on the first of January, 1881, under the name of the Permelia mine. The instructions of the court to the jury were erroneous in several particulars.

1. The evidence tended to show a location of the ground in question by Neal prior to the attempted location by the plaintiff. Whether or not such location by Neal, if made, was abandoned or forfeited prior to the plaintiff's attempted location on the first of January, 1881, was a question for the jury to determine. If at the date mentioned it remained a valid, subsisting location, the ground was not open to location by the plaintiff or any one else. The third and fifth instructions given by the court below were, therefore, erroneous.

2. The court further instructed the jury "that a monument of stone two feet high, placed in the center of the location, with a notice of location placed thereon, and a similar monument of stone or a stake at the center of each end of the location, and a similar monument or stake at each corner of the location, are a sufficient marking of the location on the ground, and constitute a valid location of a mining claim." That depends on the condition of the ground to be located. If the conformation is such that monuments and stakes of the description given would so mark the boundaries as that they could be readily traced, they would be sufficient; otherwise not. But that was a question for the jury.

3. The court erred in instructing the jury, as it did in the second instruction, that *if they should find* "that the defendant, in his answer, denies plaintiff's title, possession and right of possession, and claims title, possession and right of possession in himself, then, as to the question of ouster, you are instructed to find for the plaintiff." The construction of the pleadings was a question for the court and not for the jury. The answer admitted the ouster, and the court, therefore, further erred in the first instruction in telling the jury that the question of the ouster of the plaintiff by the defendant was one of the issues to be tried by them.

Judgment and order reversed and cause remanded for a new trial.

MCKINSTRY, J., and MCKEE, J., concurred.

No. 8,731.

LAKE COUNTY *v.* SULPHUR BANK QUICKSILVER MINING COMPANY.

Department One. Filed November 19, 1885.

TAXATION—ASSESSMENT TO CORPORATION—REFERENCE TO AGENT.—An assessment to the "Sulphur Bank Quicksilver Mining Company, F. Fiedler, agent," will be construed as being an assessment to the company, and that the reference to F. Fiedler, agent, was only to him as agent of the company.

THE SAME—SUPERINTENDENT OF COMPANY IS MANAGING AGENT—LIST OF TAXABLE PROPERTY FURNISHED BY—ESTOPPEL TO DENY SUFFICIENCY OF DESCRIPTION.—The superintendent of a mining company is the managing agent thereof, and, as such, is authorized, under sections 3,629 and 3,630 of the political code, to furnish the assessor a list of the taxable property of the corporation. And in an action to collect the tax, the corporation is estopped to question the sufficiency of the description of the real property assessed, if the same conforms to the description contained in the list furnished the assessor.

THE SAME—JUDGMENT FOR AMOUNT OF TAXES—AMOUNT DUE STATE AND COUNTY MUST BE DISTINGUISHED.—In an action by a county to collect a tax for state and county purposes, the judgment should not be for a gross amount, but should distinguish between the amounts due the state and county respectively.

APPEAL from a judgment of the superior court of Lake county, entered in favor of the plaintiff. The opinion states the facts.

Julius C. McCeney and *Welch & Britt*, for the appellant.

R. W. Crump, for the respondent.

ROSS, J. 1. The assessment put in evidence shows property assessed to "Sulphur Bank Quicksilver Mining Company, F. Fiedler, agent." It is contended for the appellant that from this it cannot be told whether the assessment is to the mining company or to F. Fiedler, or to agent. We think there is nothing in the point. If the same question was put to any one with ordinary sense in the business walks of life, he would have no difficulty in understanding that the assessment was to the Sulphur Bank Quicksilver Mining Company, and that the reference to F. Fiedler, agent, was only to him as agent of the company. We think the same common sense view should be taken by the judges.

2. It is insisted that certain of the descriptions of real property found in the assessment are radically defective. But all of the descriptions were taken by the assessor from a list furnished him by Fiedler, who was the superintendent of the defendant company. It is said, however, that the statute, political code, secs. 3,629, 3,630, requires that the statement of the property of a corporation must be made by its president, secretary, cashier or managing agent, and that Fiedler was neither of these; that he was only *superintendent*, and, therefore, not authorized to furnish the list to the assessor. The only difference we can see between the "managing agent," and "superintendent" of a mining company is one of name. We, therefore, conclude that he was not only authorized, but required, upon demand, to furnish the assessor with a list of the property of the company of which he was superintendent, and that the company is estopped from questioning the sufficiency of the description so furnished in an action to collect the tax: City and County of San Francisco v. Flood, 64 Cal., 504; People v. S. & C. R. R. Co., 49 Cal., 415.

These views dispose of such points in the present case, requiring special notice, as are not covered by the decision in the case of the same title, No. 8,057, and filed October 10, 1884: 4 West Coast Rep., 186. In that case it was determined that section 3,803, of the political code, refers to the "delinquent taxes" mentioned in the sections immediately preceding, and which remain unpaid until the third Monday of March. In so far, therefore, as the judgment appealed from allows interest on the amount of taxes at the rate of two per cent per month, it is erroneous. The judgment is also irregular in that it is for a gross sum, not distinguishing between the amounts due the state and county respectively: Lake Co. v. S. B. M. Co., *supra;* Sacramento v. C. P. R. R. Co., 10 Pac. C. L. J., 315. In all other respects the judgment is right. And as the errors can be corrected without a new trial, it is here adjudged that the cause be, and hereby is, remanded, with directions to the court below to modify the judgment in the particulars indicated, and, as so modified, it will stand affirmed.

MCKEE, J., and MCKINSTRY, J., concurred.

No. 8,507.

HOOK v. HALL.

In Bank. Filed November 19, 1885.

NOTICE OF MOTION FOR NEW TRIAL NO PART OF JUDGMENT ROLL OR RECORD ON APPEAL.—The notice of intention to move for a new trial constitutes no part of the judgment roll or of the record to be furnished to the supreme court on appeal from an order granting or denying a new trial.

THE SAME—PRESUMPTION IN FAVOR OF ACTION OF LOWER COURT.—In support of the action of the lower court in granting a new trial, in an action tried by a jury, it will be presumed that the motion was made on the ground (amongst others) that the verdict was not justified by the evidence; and, if the evidence be substantially conflicting, the order will be affirmed.

THE SAME—TIME OF FILING NOTICE—RECITAL IN STATEMENT OF CASE.—The fact that a notice of motion for a new trial was not filed within the time required by the code of civil procedure will not be inferred, on appeal, from a recital, contained in the statement of the case, immediately preceding the judge's certificate of settlement, to the effect that the adverse party reserves the right to object to the hearing of the motion on the ground that the notice of motion was not filed in time. Such recital cannot by treated as in the nature of a bill of exceptions.

APPEAL from an order of the superior court of Monterey county, granting the defendant a new trial. The opinion in department is reported in 6 West Coast Reporter, 134.

W. S. Dodge and *H. V. Morehouse*, for the appellant.

Julius Lee, *A. S. Kittredge*, *A. L. Hart* and *S. S. Hall*, for the respondent.

MCKINSTRY, J. The notice of intention to move for a new trial constitutes no part of the judgment roll or of the record to be furnished to this court on appeal from an order granting or denying a new trial: C. C. P., 661, 952.

In support of the action of the court below it will be presumed that the motion for new trial was made on the ground, amongst others, that the verdict was not justified by the evidence; and, as there was a substantial conflict in the evidence, the order must be affirmed here in accordance with the settled rule.

In the "statement of the case" on motion for new trial, immediately preceding the judge's certificate of the settlement of the statement, is the recital:

"The plaintiff in filing and submitting amendments to defendant's statement on motion for new trial herein specially reserves the right and does not waive any rights that she may have to object and except to the hearing of the said defendant's motion for new trial, on the ground that the notice of said motion was not filed with the clerk of said superior court within the statutory time prescribed by section 659 of the code of civil procedure of the state of California."

This portion of the statement cannot be treated as in the nature of a bill of exceptions. The *facts* are not set out, and, as the notice of intention constitutes no part of the record, we are not informed but that the motion was filed within the time prescribed by the code.

Order affirmed.

THORNTON, J., ROSS, J., and MCKEE, J., concurred.

No. 8,380.

OAKLAND GASLIGHT COMPANY *v.* DAMERON ET AL.

Department One. Filed November 19, 1885.

FINDINGS ON STATUTE OF LIMITATIONS—SUFFICIENCY OF.—A plea that plaintiff's cause of action is barred by certain sections of the code of civil procedure, are sufficient, if the same are as broad and as specific as the plea.

EJECTMENT—POSSESSION OF TENANT IS POSSESSION OF LANDLORD.—In an action of ejectment, evidence that the defendant was the landlord of the tenants in possession, is sufficient evidence of the possession of the defendant, under section 379 of the code of civil procedure.

CORPORATION—EVIDENCE OF EXISTENCE, DE FACTO.—In such action the corporate existence of the plaintiff may be established by evidence that it was a corporation *de facto*.

GRANT OF MARSH LANDS BY MEXICAN GOVERNMENT.—The want of power in the Mexican government to grant marsh lands lying between the high and ordinary high tide, *held* not to have been satisfactorily shown.

APPEAL from a judgment of the superior court of Alameda county, entered in favor of the plaintiff, and from an order denying the appellants a new trial. The opinion states the facts.

C. A. & C. Tuttle and *J. P. Dameron*, for the appellants.

W. W. Foote, for the respondent.

MCKINSTRY, J. It is urged by appellant that the court below did not find on the plea of the statute of limitations. The plea is that plaintiff's cause of action is barred by sections 315, 316, 318 and 332 of the code of civil procedure. The finding is as broad and specific as the plea.

The defendant Dameron moved for a nonsuit on the ground that there was no evidence that he was in possession of the demanded premises when the suit was brought, or at any time. Section 379 of the code of civil procedure, provides: "In an action to * * * determine the right to the possession of real property which, at the time of the commencement of the action, is in the possession of a tenant, the landlord may be joined as a party defendant." There was evidence that the defendant Dameron was the landlord of the tenants in possession.

There was evidence that the plaintiff was a corporation *de facto*.

In this action such evidence was admissible and established the existence of the corporation as against the defendants.

It is said by counsel for appellant that the vital question in the case is: Is the plaintiff entitled to recover the possession of marsh land which lies between the high and ordinary high tide? It has been adjudicated in the proceeding which resulted in the confirmation of the grant to Peralta, that the Mexican government granted to him the lands herein demanded. It has not been shown to our satisfaction that the Mexican government had no power to make the grant, even if it be conceded that the existence of such power was not determined by the adjudication referred to.

Judgment and order affirmed.

ROSS, J., and MCKEE, J., concurred.

No. 8,197.

HOBART v. TYRRELL.

Department One. Filed November 19, 1885.

ORDER ON DEBTOR—ASSIGNMENT OF DEBT PRO TANTO—FRAUD ON CREDITORS.—Orders drawn in favor of a third person by a creditor on his debtor, and accepted by the latter, operate as an assignment of so much of the debt as is represented by them. Such assignee thereupon becomes a creditor of the debtor, and, as such, may attack a subsequent conveyance by the latter, under section 3,439 of the civil code, on the ground of fraud against creditors.

EVIDENCE—AFTER ADMISSION OF PORTION OF WRITING, WHOLE MAY BE GIVEN.—When a portion of certain testimony given by a witness, in another proceeding, is permitted to be read and given in evidence, the opposite side, under section 1,854 of the code of civil procedure, may read the whole of such testimony.

APPEAL from a judgment of the superior court of Alameda county, entered in favor of the defendant, and from an order denying the plaintiff a new trial. The opinion states the facts.

R. A. Redman, for the appellant.

J. G. McCallum, for the respondent.

ROSS, J. The subject of this controversy is a certain promissory note executed by the California Hosiery Company to Francis A. Hobart, the plaintiff and appellant herein, and levied on by the respondent as sheriff by the virtue of a writ of attachment issued in an action brought by one Clay against John A. Hobart, the father of appellant. The note was executed for part of the purchase money of a piece of land which was, on the twentieth of March, 1880, conveyed by John A. Hobart to his son Francis, as a gift, and afterwards conveyed under a power of attorney by John A., as attorney in fact of Francis A. Hobart, to the California Hosiery Company.

The main question in the case is whether or not the conveyance from John A. Hobart to his son Francis was fraudulent as against Clay. On the part of the appellant it is contended that section 3,439 of the civil code does not apply to those who become creditors after the making of the conveyance, and that Clay was such subsequent creditor. But in respect to Clay's status we think counsel mistaken. It appears that one Kennedy had entered into a contract with some Chinamen by which, in consideration of the sum of seventeen thousand dollars to be paid them, they were to do certain work in and about the construction of a certain road and tunnel, and that on or about January 25, 1880, John A. Hobart guaranteed the payment of the money upon that contract. That the Chinamen proceeded with the work, money became due them therefor, Clay advanced them money and took orders therefor on Hobart, which were accepted by him. The guaranty by John A. Hobart was prior to his conveyance to his son, as were also the advances by Clay to the Chinamen. The liability of Hobart was then existing upon which he might, and afterwards, in fact, did, become liable to pay money to Clay by reason of the orders drawn on and accepted by him. These operated as an assignment of so much of the debt as

was represented by them. As assignee, Clay stood in the same position as his assignors.

The evidence is such that we would not be justified in disturbing the findings of the trial court, upon the ground that they are unsupported by the evidence.

The court below permitted a witness to read against the objection of the plaintiff, the testimony given by John A. Hobart upon an examination theretofore had before a justice of the peace, and this is claimed to have been error, for the reason that no proper foundation therefor had been laid. But it appears from the record that Hobart, when on the stand, without being asked in respect thereto, read an extract from the same testimony, saying at the time that what he had read was not all that he had testified to on that occasion. Under such circumstances, was it error to permit Baker to read all of his testimony? We think not, under the provisions of section 1,854 of the code of civil procedure, which reads: "When part of an act, declaration, conversation, or writing, is given in evidence by one party, the whole on the same subject may be inquired into by the other; when a letter is read, the answer may be given; and when a detached act, declaration, conversation or writing, is given in evidence, any other act, declaration, conversation or writing which is necessary to make it understood, may also be given in evidence."

Other points made do not require special notice.

Judgment and order affirmed.

MCKINSTRY, J., and MCKEE, J., concurred.

No. 20,091.

PEOPLE *v.* SULLIVAN.

Department Two. Filed November 19, 1885.

MURDER—EVIDENCE—DECLARATIONS OF DECEASED—ADMISSION OF, WHEN NOT ERROR.—In a prosecution for murder, the admission of declarations of the deceased, made after receiving the injury, although not properly dying declarations or part of the *res gestæ*, will not warrant a reversal, if not calculated to prejudice the defendant.

THE SAME—EXPERT TESTIMONY AS TO NATURE OF WOUND.—A witness, although not a professional expert, may testify as to whether, in his opinion, a wound was inflicted with a dull or sharp instrument, if he testifies that he has had experience with wounds, and is able to tell from seeing them what they were made with.

THE SAME—INSTRUCTIONS ALREADY GIVEN NEED NOT BE REPEATED.—In such case the refusal to give an instruction on the question of self defense, is not error, if the same has already been given in other instructions.

APPEAL from a judgment of the superior court of Fresno county, entered upon a verdict convicting the defendant of murder, and from an order denying him a new trial. The opinion states the facts.

Campbell & Hinds, for the appellant.

E. C. Marshall, attorney general, for the respondent.

MORRISON, C. J. The defendant was convicted of the crime of murder in the second degree, and adjudged to suffer imprisonment therefor for the term of twenty-five years. On this appeal he makes the following points:

I. The court erred in admitting the declaration of deceased.

II. The court erred in admitting the testimony of H. J. White, who claimed to be an expert, as to whether the wound had been inflicted with a dull or sharp instrument.

III. The court erred in refusing to give an instruction asked by the defendant, upon the hypothesis that his testimony was true.

1. The following is the testimony objected to under the first alleged error:

"Counsel for the people asked the following questions, upon which the court made the ruling that follows:

"Q.—Did he, deceased, say anything about sending for a doctor while in that condition?

"A.—Yes; I will tell you.

"Q.—Just state what he said about sending for a doctor?

"Mr. Hinds, counsel for defendant.—We object to it on the ground that it is incompetent, and not admissible as a dying declaration, or as a part of the *res gestæ*.

"Mr. Harris, for the people.—We want to show that the deceased asked them if they had sent for a doctor, and they said no, but they would, and he said it was no use, they couldn't do him any good. We want to establish the foundation for introducing other declarations. Does the court admit the question?

"Court.—Yes.

"Mr. Hinds.—We take an exception.

"Mr. Harris.—State what he said about sending for a doctor, first.

"A.—He asked if we sent for a doctor. He was told no, but there would be a doctor there as soon as possible. Says he, 'I don't think it is necessary; I don't think a doctor will do me any good.'

"Q.—Did he say anything else in that conversation?

"Counsel for defendant.—We object to any declarations, on the ground that they are incompetent, not dying declarations, or a part of the *res gestæ*.

"Court.—Same ruling and same exception.

"Q.—Go ahead.

"He asked if he was hurt. He was told he was. How he got hurt? He was not told how he got hurt, and then he says: Have you sent for a doctor? They said there would be a doctor there as soon as we could get him there. He says: I don't think it is necessary, because I don't think he could do me any good; and then asked if we had any morphine, and they said no. He died about an hour and a half—about two hours, I guess—after he said these words.

"Q.—He asked how he got hurt?

"A.—Yes, sir."

Even if it be conceded that the foregoing testimony was improperly admitted, there is nothing in it calculated to prejudice the de-

fendant, and if error was committed by the court in admitting it, it was error without injury.

2. The second alleged error relates to the testimony of H. J. White.

The witness, after fully describing the wounds found on the person of the deceased, and after testifying that he had had experience in seeing, very frequently, cut wounds, and was well acquainted with wounds made with a sharp instrument, and blunt ones also, said: "I have been here since 1849, and have seen a great deal of this kind of work. From my experience I am competent to tell from seeing a wound what it was made with." He was then asked by the counsel for the people as follows:

"Mr. Harris, did that wound [meaning a wound he had described] have the appearance of being done by a sharp instrument or a dull instrument?

"S. J. Hinds, counsel for defendant.—We object to the testimony on the grounds. Frst, that he is not shown to be a professional expert on wounds. Second, that granting that he is an expert on wounds, it is incompetent for a man looking at a wound to give his opinion as to how it was caused, whether he speaks professionally or otherwise; he can state the facts but he can't state his opinion.

"The Court.—The court will overrule the objection.

"Mr. Hinds.—We except."

In answer to the question, the witness stated that the wound had the appearance of being done with a dull instrument. The same witness testified to having found blood and gray hairs on the blunt end of the axe found near the place of killing, that is, the hairs were found on what was called the pole of the axe and the blood on the handle, and the wound being testified to was located by witness as having been found on the head of deceased, who had black and gray hair.

We do not see, in view of all the circumstances in evidence in the case, how the defendant could have been injured by the testimony complained of, for he made a full statement of the facts attending the homicide, between which statement and the testimony of White there is no conflict.

But we are of opinion that the witness, White, was a competent witness in respect to the matter on which he testified, and for that reason there was no error in admitting his testimony.

3. The third point presents a more material and important question, and it challenges the action of the court in refusing to give an instruction asked by the defendant as follows:

"If you have in your minds a reasonable doubt as to whether defendant's story is true or false, that is, if you are not satisfied that it is false, then his story shows he acted in protecting himself from great bodily harm, or that his position or surroundings were such as to excite in the mind of a reasonable person that his life or body was in great danger, then you should not hesitate to acquit him and give him the benefit of that doubt."

The foregoing instruction, as we understand it, does not contain a correct statement of the law, and if it did, the matter covered by the question of self-defense was embraced in other instructions given the jury by the court.

After an examination of all the instructions in the case, we think the law was fully and correctly stated on the trial, and, finding no substantial error in the record, the judgment and order are affirmed.

MYRICK, J., and THORNTON, J., concurred.

No. 20,106.

PEOPLE v. ROBERTSON.

Department One. Filed November 19, 1885.

MURDER—KILLING DURING COMBAT—JUSTIFICATION AND MITIGATION.—The mere fact that the deceased and the defendant were in actual combat at the time of the homicide does not, of itself, mitigate the homicide or justify or excuse it. Justification or excuse for taking human life must arise out of the circumstances in which the killing took place, as proved by the testimony on the part of the prosecution or of the defendant. If the circumstances show that a person, armed with a deadly weapon, on being assaulted, takes advantage of the assault made upon him to kill his assailant, and does, in execution of his purpose, kill him, not in the heat of passion caused by the assault, nor in reasonable defense of himself against the assault, it is murder.

THE SAME—EXISTENCE OF MALICE, MAY BE INFERRED FROM FACTS FOLLOWING THE ASSAULT.—If the circumstances of a combat following an assault show that from the outset the words and acts of the defendant indicated an intention to kill, or to take his assailant at an unfair advantage to kill him under the color of the assault, it is murder. The sufficiency of such circumstances, as evidence to prove the existence of malice, is a matter for the consideration of the jury.

THE SAME—SELF-DEFENSE—ENDEAVOR TO DECLINE FURTHER COMBAT—CASE IN JUDGMENT.—The defendant went into the store of the deceased, and upon the latter's refusal to sell to him on credit, commenced to abuse the deceased with opprobrious and threatening language. The deceased then picked up an iron-hooked stick, and with the end of it "poked and punched" the defendant, who fell on the porch of the store. The defendant got up and, instead of going away, turned upon the deceased, and seized hold of the stick; in the struggle over it the defendant stabbed the deceased, killing him almost instantly. *Held*, that such killing was not in self-defense; that, in order to constitute a justification, under such circumstances, the defendant should have really and in good faith endeavored to decline any further struggle before taking the life of his assailant.

THE SAME—PAUSE IN COMBAT—RENEWAL OF ASSAULT.—It appeared that when the defendant fell upon the porch the deceased did not continue the assault upon him. *Held*, that such fact constituted a sufficient pause in the combat, upon which to base an instruction as to the effect, on the defense of justification, of a renewal of the affray by the defendant.

THE REFUSAL TO GIVE AN INSTRUCTION THAT HAS ALREADY BEEN GIVEN in substance, is not error.

THE SAME—PROSECUTION NEED NOT CALL ALL PERSONS PRESENT AT KILLING.—The denial of a motion made by the defendant, after the prosecution rested, to order the prosecution to call and examine as witnesses in the case certain persons who were said to have been present at the time of the homicide, is not error.

APPEAL from a judgment of the superior court of Mendocino county, entered upon a verdict convicting the defendant, and from an order denying him a new trial. The opinion states the facts.

J. A. Cooper, *J. Q. White* and *J. M. Mannon*, for the appellant.

E. C. Marshall, *attorney general*, for the respondent.

MCKEE, J. Defendant was convicted of murder in the second degree, and sentenced to ten years in the state prison. On this ap-

peal from the judgment, and an order denying a motion for a new trial, it is contended:

1. That the verdict is not supported by the evidence.

The evidence shows that defendant, on the twenty-fourth of August, 1884, twice stabbed one A. Davis with a butcher-knife. In one of the stabs the knife was driven into his body, between the fifth and sixth ribs, upward and forward toward the heart, the point of the knife penetrating the heart, causing almost immediate death. The stabbing was done in the excitement of an angry quarrel and scuffle which originated in an attempt by the defendant and two others to buy a watermelon at a store in the town of Covelo, kept by the wife of Davis. Davis himself was in charge of the store at the time, and when the parties asked him to sell them a watermelon on credit, he told them he had no watermelons to sell on credit, and to go along about their business. They did not leave. Defendant refused to go, saying he would do as he pleased, and commenced to abuse Davis with opprobrious and threatening language. In these circumstances, Davis picked up an iron-hooked stick, six or seven feet long, which was used in the store for bringing down buckets and things from hooks on which they hung, and with the end of the stick he "poked and punched" the defendant, who fell on the porch of the store. The defendant got up and, instead of going away, turned upon Davis, who was standing inside the store, and Davis again used the stick to "punch" him; but the defendant got hold of the stick, and Davis, in trying to jerk it away from him, jerked him inside the store, where, in the struggle over the stick, defendant continued to curse and swear at Davis, and threatened to kill him. In these circumstances, the wife of Davis stepped in between the two, and ordered her husband to go to the back part of the store, and the defendant to go away. But neither let go the stick, and the defendant struck at Davis, past the woman, cutting one of her fingers in the act. The blow caused Davis to stagger and cry out that he was cut. In the act of staggering, he let go the stick and picked up an axe-handle, which he raised as in the act to strike, when the defendant closed with him, stabbed him again, and shoved him against a show-case on the counter of the store, where he fell and died with the defendant atop of him. Defendant immediately arose from the body, walked out of the store, and across the street to a saloon, where, as a witness expresses it, "he laid right upon a card-table in the saloon, turned one leg upon it and pulled out his knife, upon the blade of which there was blood all the way up to the hilt, and said: 'I have been spaying, or splaying, the s—— of a b——.'"

In his own behalf the defendant testified: "Deceased got mad about something I said about the melon, and jumped down and got this rod and called me a d—— s—— of a b——, and punched at me with one end of the rod. He then turned the rod and punched at me with the other end and knocked me down. While I was getting up he got an axe handle and hit me; the second time he hit m

I caught the handle and he jerked me inside the store; he jerked away from me in the store and started to hit me again with it. I ran in under him then and cut him. As soon as I could get him to let loose of me, I walked right out and went over to Mr. Montague's. He hit me in the stomach with the stick and knocked me down on my back."

This evidence, it is argued, proves that the killing was done in the heat of blood, upon provocation, and without malice, and that it amounted to manslaughter only, and not murder.

But the conduct of the defendant in connection with the homicide, his persistent threats to kill Davis, the use of a deadly weapon in killing him, and his bravado immediately after the killing, are things which do imply malice in them. Their sufficiency as evidence to prove the existence of malice was matter for the consideration of the jury; and as the jury found from them that the defendant unlawfully killed the deceased in malice, and not in the heat of passion caused by the assault made upon him by the deceased, it cannot be said, as matter of law, that the evidence was insufficient to support their verdict.

The mere fact that the deceased and defendant were in actual combat at the time of the homicide does not of itself mitigate the homicide or justify or excuse it. Justification or excuse for taking human life, must arise out of the circumstances in which the killing took place, as proved by the testimony on the part of the prosecution or of the defendant. And it is well settled, if the circumstances show that a person armed with a deadly weapon, on being assaulted, takes advantage of the assault made upon him to kill his assailant, and does, in execution of his purpose, kill him, not in the heat of passion caused by the assault, nor in reasonable defense of himself against the assault, it is murder: 2 Bish. Cr. Law, 736.

It is also well settled that if the circumstances of a combat following an assault show that from the outset the words and acts of the defendant indicated an intention to kill, or to take his assailant at an unfair advantage to kill him under the color of the assault, it is murder: 1 Russell on Crimes, 527, 532, 585, 592; 2 Whart. Cr. Law, secs. 953, 955, 987, 996.

2. The next assignment of error is, that the court instructed the jury as follows:

"Before the defendant can claim that he was acting in self-defense, it must appear that the defendant must really, and in good faith, have endeavored to decline any further struggle before the homicide was committed. And in this case, if you believe from the evidence that the defendant was engaged in mortal combat with Davis, the deceased, and that the defendant did not really, and in good faith, endeavor to decline any further struggle before the homicide was committed, if one were committed, then, and in such case, the defendant cannot avail himself of the plea of self-defense."

The proposition is, that if a person is assaulted by another, with whom he engages in a combat, he must really, and in good faith,

endeavor to decline any further struggle before taking the life of his assailant.

According to the common law it is the duty of a person assaulted to give way "as far as the fierceness of the assault will permit him:" 1 Hale P. C., 483. But if the assault be so fierce as not to allow him to yield a step without manifest danger of his life or great bodily harm, then, in his defense he may kill his assailant instantly; and this, says Blackstone, "is the doctrine of universal justice as well as of the municipal law:" Comm. Bk., 4 p., 185.

Upon that principle are founded the provisions of our penal code on the same subject. Section 197 of the code in effect declares: That if a person is assaulted in such a way as to give him ground, as a reasonably prudent man in the condition in which the assault places him, to apprehend a design on the part of the assailant to commit a felony upon him, or to do him some great bodily harm, he has the right instantly to defend himself, and, if necessary, to prevent such real or apparent danger to his person, to kill his assailant. Real or apparent danger, or danger imminent and immediate to life or limb, is, therefore, a sufficient condition in which to exercise the right of self-defense. No withdrawal or retreat is required. So assailed a person has a right to stand his ground, and, if necessary, in defense of himself, slay his assailant. But necessity, real or apparent, for taking human life, arising out of the circumstances in which the homicide is committed, must exist, and the person himself must be without fault.

"The weight of authority," says the supreme court of Indiana, "establishes the doctrine that, when a person, being without fault and in a place where he has a right to be, is violently assaulted, he may, without retreating, repel force by force, and if, in the reasonable exercise of his right of self-defense, his assailant is killed, he is justifiable:" Runyon v. State, 57 Ind., 84; 1 Bish. Cr. Law, sec. 865.

In this case, according to the evidence, the defendant was not conducting himself lawfully. He should have left the store when he was told to go. He had no right to remain and abuse the person in charge of the same with opprobrious epithets and threats to kill. Being where he had no right to be and doing what he had no right to do, he was not without fault when Davis assailed him in order to compel him to go away. Nor did the nature of the assault upon him endanger his life or limb. There was no time, from the commencement of the affray to the time of the stabbing, when he could not have withdrawn without danger. That being so, the necessity for taking the life of his assailant did not exist, except by his own creation; for when he got up from the porch where he had fallen, he could have gone away out of danger; but he turned upon Davis, and, engaging him in a struggle over the stick with which Davis had been prodding him, forced him inside the store and killed him. When a killing takes place under such circumstances, it is true, as a matter of law, that the slayer should, really, and in good

faith, have endeavored to decline any further struggle before the homicide was committed: Sub. 3, sec. 197, Penal Code.

3. The giving of the following instruction to the jury is also assigned as error:

"If the jury believe from the evidence that there was first an affray on the porch of the store, and that the deceased pushed the defendant down with the iron hook, and that then the deceased returned to the store, and the affray then ceased for a sufficient length of time for reason to have resumed its sway, and the defendant had sufficient time to realize the situation before anything further was done by the contending parties, and that then the defendant went into the store and there attacked the deceased, and then killed him as charged in the information, and not in necessary self defense, then I charge you that the defendant was not justifiable in inflicting the mortal blow."

It is said there was no evidence of a cessation of hostilities. But it does appear that when the defendant fell on the porch Davis did not continue the assault upon him; there was, therefore, a pause in the combat, and to that phase of the case the instruction was applicable.

4. The refusal to give the ninth instruction, in a series of instructions which the defendant asked, did not prejudice the defendant, because the matter to which it related was substantially covered by the eighth instruction, which the court had given to the jury at the defendant's request.

5. There was no error in the denial of a motion made by the defendant after the prosecution rested, to order the prosecution to call and examine as witnesses in the case certain persons who were said to have been present at the time of the homicide.

Besides, the same persons were afterwards called and examined as witnesses by the defendant.

We find no prejudicial error in the record.

Judgment and order affirmed.

ROSS, J., and MCKINSTRY, J., concurred.

No. 8,385.

SCRIVNER ET AL. v. DIETZ ET AL.

Department One. Filed November 19, 1885.

ATTACHMENT—IRREGULARITY IN AFFIDAVIT, DOES NOT INVALIDATE.—An irregularity in an affidavit for an attachment, in failing to contain a statement that the payment of the contract sued upon was not secured by any mortgage or lien upon any real or personal property, or if it was so secured, that the security had become valueless, without any act of the plaintiff or the person to whom such security had been given, does not render the attachment void, so that it can be collaterally attacked by a stranger, but merely voidable at the instance of the attachment debtor.

PRIORITY OF LIEN—MAY BE LOST BY ACTS OF LIENOR.—A prior lien gives a prior claim, which is entitled to prior satisfaction out of the subject it binds, unless the lien be intrinsically defective, or be displaced by some act of the party holding it which shall postpone him in a court of law or equity to a subsequent lien claimant. Consequently in an action to fore-

close a prior mortgage, subsequent attaching creditors are entitled to prove the existence of their attachment liens, and to show that in consequence of the acts of the plaintiff, they are superior to the lien of the plaintiff's mortgage.

APPEAL from a judgment of the superior court of Alameda county, entered in favor of the plaintiffs, and from an order denying the defendants a new trial. The opinion states the facts.

C. A. & C. Tuttle, for the appellants.

Winans, Belknap & Godoy, for the respondents.

MCKEE, J. This is an action against C. M. Grant, mortgagor, and other defendants, alleged claimants of subsequent liens upon the mortgaged property, for the recovery of judgment against the mortgagor, and the foreclosure of a real estate mortgage given by him on the twenty-second December, 1875, to the London and San Francisco Bank, limited, to secure payment of an indebtedness of five thousand dollars and interest, and such other sums, with interest, as the said bank might advance to the said Grant after the date of the mortgage.

Of the defendants, Grant made default, and the defendants Dietz, McAfee and Spiers, in their answer, averred that they had acquired an interest in the mortgage property by a writ of attachment issued in an action commenced on the twenty-second of January, 1876, by McAfee and Spiers againt the said Grant, in which they afterwards recovered judgment against him, upon which an execution was issued, under, and by which, the attached property was sold at sheriff's sale to them, and they, in due course of time, received a sheriff's deed for the same, and they claim that the interest thus acquired is not subject to the mortgage lien of the plaintiff, but is superior thereto, because, (1) whatever advances were made by the bank to said Grant were made after notice to the bank of the acquisition by the defendants of their interest and right in the mortgage property under said attachment; (2) because the cause of action upon advances which were made was barred by the statute of limitations at the commencement of the action; and (3) because the mortgage itself was merged in a deed of the property which the mortgagor executed and delivered to the bank.

At the trial of the issues framed by the complaint and answer, the execution and registration of the mortgage were admitted; and after the plaintiff had given evidence tending to prove that the sum of the original indebtedness of five thousand dollars, and the future advances, which were made by the bank from the date of the mortgage until the thirty-first of January, 1879, amounted to nine thousand seven hundred and seventy-nine dollars, and were due and unpaid, the defendants, to maintain the issues on their part, first offered the affidavit and writ of attachment, together with the return thereon, issued in the action of McAfee and Spiers against the said C. M. Grant. But the plaintiff objected to the affidavit, and the attachment and the return thereon, "because the affidavit was defective for non-compliance with the code and a nullity; that it is void for

irregularity, and conferred no authority upon the clerk to issue an attachment; that as evidence it was incompetent and irrelevant and inadmissible; that even if, *stricti juris*, it was only voidable and not void, it laid no foundation for the issuance of an attachment which could be operative against the rights of plaintiff or plaintiff's assignor under the mortgage," etc.

The court sustained the objections and defendants Dietz, McAfee and Spiers excepted to the ruling.

The irregularity upon which these objections were made is this: The affidavit contained no statement that the payment of the contract sued upon was not secured by any mortgage or lien upon any real or personal property, or, if it was so secured, that the security had become valueless, without any act of the plaintiff or the person to whom such security had been given.

Admittedly, this irregularity in the affidavit constituted good ground for a motion by the attachment debtor to dissolve the attachment; and if such a motion had been made by him to the court, in which the action was pending, it would have been the duty of the court to have dissolved the attachment: Hawley v. Delmas, 4 Cal., 195; Wilke v. Cohn, 54 Cal., 212; Merced Bank v. Morton, 58 Cal., 360. But neither the regularity of the affidavit nor the validity of the attachment issued upon it, was questioned by the debtor; he, therefore, waived whatever irregularities existed in either, and, as against him at least, the attachment was valid and operative. So that its execution, if according to law, operated to create a provisional lien upon the property on which it was levied, in favor of the attaching creditors; and as this lien, upon the recovery of a judgment in the action *transit in rem judicatam*, and is merged in the judgment, the attachment proceedings are not attackable collaterally for an infirmity in the affidavit: Porter v. Pico, 55 Cal., 165; Harvey v. Foster, 64 Cal., 296. Notwithstanding the infirmity, the attachment was not void, it was only voidable at the instance of the attachment defendant, and could not be assailed collaterately by a stranger: Harvey v. Foster, *supra*. The ruling of the court excluding the affidavit, attachment, and return thereon, was, therefore, erroneous.

But it is said that the ruling was not prejudicial, because the attachment, if legal, could not have defeated plaintiff's mortgage, which, being prior in point of time, was superior in point of right to the subsequent attachment lien, which was subordinate to it.

Unquestionably, a prior lien gives a prior claim, which is entitled to prior satisfaction, out of the subject it binds, unless the lien be intrinsically defective, or be displaced by some act of the party holding it which shall postpone him in a court of law or equity to a subsequent lien claimant: Rankin v. Scott, 12 Wheat., 177. But the defendants were entitled to prove the existence of their attachment lien, and to show that in consequence of the acts of the plaintiff, set up in their answer, it was superior to the lien of the plaintiff's mortgage.

Judgment and order reversed, and cause remanded for a new trial.

McKINSTRY, J., and ROSS, J., concurred.

No. 8,859.

CRAVEN *v.* NOLAN.

Department Two. Filed November 19, 1885.

NON SUIT—EVIDENCE TENDING TO SUSTAIN ISSUES OF COMPLAINT—When the plaintiff gives evidence tending to sustain the issues presented in the complaint, a non suit cannot be granted.

APPEAL from a judgment of the superior court of Stanislaus county, entered in favor of the defendant.

Wright & Hazen, for the appellant.

W. E. Turner, E. T. Stone, and *T. P. Ryan*, for the respondent.

THE COURT. There was evidence given on behalf of plaintiff, tending to sustain the issues presented in the complaint; therefore, the court erred in granting the motion for non suit; the evidence should have been submitted to the jury.

Judgment reversed and cause remanded for a new trial.

No. 20,097.

PEOPLE *v.* LARSEN.

Department Two. Filed November 19, 1885.

CRIMINAL LAW—MURDER—ONCE IN JEOPARDY—VOID CONVICTION.—A conviction for murder, under an information that charged the commission of the offense on a day subsequent to the date of its filing, would be a nullity and a plea of once in jeopardy, founded thereon, cannot be sustained.

APPEAL from a judgment of the superior court of Sonoma county, convicting the defendant, and from an order denying him a new trial.

W. F. Russell and *J. A. Barham*, for the appellant.

E. C. Marshall, attorney general, for the respondent.

THORNTON, J. The question presented herein as to the defense of *once in jeopardy* was passed on by this court in bank in People v. Clark, 6 West Coast Rep., 641. The decision in that case was adverse to the contention of defendant's counsel herein. It is true the defendant in that case was accused of burglary and the defendant in this case of murder. But in our view the rule adopted in Clark's case applies also to a case of murder.

The information in this case was insufficient because, as in Clark's case, it charged an offense committed on a day subsequent to the date of its filing. A conviction upon such an information would have been a nullity, and the party accused would never have been in jeopardy.

Judgment and order affirmed.

MORRISON, C. J., and MYRICK, J., concurred.

No. 8,336.

STEWART v. TAYLOR.

Department One. Filed November 19, 1886.

CLAIM AND DELIVERY—JUDGMENT MUST BE IN ALTERNATIVE.—In an action to recover possession of personal property, when the plaintiff recovers a verdict, judgment should be for the possession or the value of the property, and damages, if any are awarded, for its detention. A judgment which is not in such alternative form, as prescribed by section 667 of the code of civil procedure, is erroneous.

THE SAME—VERDICT MUST FIND VALUE OF PROPERTY—COURT CANNOT SUPPLY OMISSION IN VERDICT.—In such action a verdict for the plaintiff should find the value of the property. If it does not, the court should direct the jury to correct their verdict in such particular. If no such correction is made by the jury, the court has no power to enter judgment for the value of the property, and a judgment so entered will be reversed.

THE SAME—VERDICT MUST BE COMPLETE AND CERTAIN.—A verdict to serve as a basis for a judgment must be complete and certain, otherwise both the verdict and the judgment entered thereon are erroneous and reversible.

NEW TRIAL—ORDER ON BEFORE SETTLEMENT OF STATEMENT IRREGULAR—AFTER APPEAL ORDER CANNOT BE SET ASIDE.—An order denying a motion for a new trial is irregular if made and entered before the statement on the motion, to which amendments had been proposed, is settled and certified by the court. An order so made cannot be set aside by the lower court after an appeal has been taken therefrom to the supreme court.

APPEAL from a judgment of the superior court of Mono county, entered in favor of the plaintiff, and from an order denying the defendant a new trial. The opinion states the facts.

Kittrell & Owen and *Beatty, Beatty & Beatty*, for the appellant.

T. A. Stephens, A. N. Drown and *T. W. W. Davies*, for the respondent.

MCKEE, J. Appeal from a judgment and order denying a motion for a new trial in an action against the defendant, as sheriff of Mono county, for the recovery of personal property or five hundred dollars, its alleged value, and six hundred dollars damages.

By his answer to the complaint, the defendant specifically denied the allegations of the complaint, and pleaded justification under a writ of attachment which was issued in an action against a former owner of the property, from whom plaintiff claimed to have derived his title.

The jury before whom the case was tried, after being properly instructed as to the form of their verdict, rendered a verdict as follows: "We * * * find a verdict for the plaintiff in the sum of five hundred dollars;" and the same was entered, without objection, in the minutes of the court. Upon the verdict thus rendered, the court rendered judgment for the plaintiff "for the return and redelivery of the property mentioned in the complaint, or the sum of five hundred dollars, the value thereof, in case a redelivery of the property cannot be had, and for costs and disbursements."

The case does not show whether the property had been delivered to the plaintiff or not; and the defendant, by his answer, did not claim a return of the property. It is only where a verdict is found for defendant, in an action to recover possession of personal property, that judgment must be entered for a return of the property if the defendant claims to be entitled to its return. But as the action

is brought to recover possession, and the plaintiff obtains a verdict, judgment should be for the possession or the value of the property, and damages, if any awarded, for its detention. Such is the rule for the entry of judgment, in this class of actions, prescribed by section 667, code of civil procedure; and a judgment which is not in the alternative form as prescribed by the code is erroneous: Berson v. Nunan, 63 Cal., 550. The judgment in hand is, therefore, erroneous.

The judgment is also erroneous, because it is founded upon an informal and incomplete verdict.

The verdict was informal and insufficient in that it did not find the value of the property: Garlick v. Bower, 62 Cal., 65; Vanderford v. Foster, Id , 179. It is not helped by the fact that the phonographic reporter noted in his report of the proceedings in the case, "that the jury retired and subsequently returned into court with a verdict in favor of plaintiff, fixing the value of the property at five hundred dollars." The verdict could not be corrected in that way. The court had the power to have it corrected; for the law made it his duty to call the attention of the jury to the fact that their verdict was insufficient, and to advise them in what it needed to be corrected. The correction could then have been made by the jury in the presence of the court, or they could have retired to further consider their verdict and put it in proper form. That was not done; and the court, in accepting the verdict in its defective form and pronouncing judgment upon it, assumed as a fact what the verdict did not express, and, in so doing, invaded the province of the jury; for the jury alone could find the value of the property.

A verdict to serve as a basis for a judgment must be complete and certain, otherwise both the verdict and judgment entered thereon are erroneous and reversible: Dougherty v. Haggin, 56 Cal., 522; Kelly v. McKibbens, 54 Cal., 192.

The order appealed from is also irregular, because it was made and entered before the statement on motion for a new trial, to which amendments had been proposed, was settled, and certified by the court.

The transcript shows that nearly five months after the entry of the order, the court, finding that it had erroneously or inadvertently denied the motion for a new trial before the settlement of the statement upon which the motion was to be made, vacated and set aside the order, settled and certified the statement and denied the motion for a new trial. This order purports to have been made on the twelfth of November, 1881. But the defendant had appealed from the order on the thirtieth of June, 1881, and when the order of the twelfth of November was made and entered, the case was pending in this court.

There is no doubt that the court in which an irregular order is made and entered, may, where the irregularity is apparent on suggestion, motion or *ex mere motu*, set it aside at any time before an appeal is taken from it. Such an order, however, is valid until set

aside or reversed on appeal; and where an appeal has been taken from it the jurisdiction of the court *a quo* is suspended, so that pending the appeal the court below cannot vacate and set aside the order appealed from: Bryan v. Berry, 8 Cal., 135.

Whence it results that the order appealed from denying defendant's motion for a new trial and the judgment entered in the case must be reversed.

Judgment and order reversed and cause remanded for further proceedings.

ROSS, J., and MCKINSTRY, J., concurred.

No. 9,234.

BARTON v. BROWN.

Department One. Filed November 19, 1885.

SALE OF PERSONAL PROPERTY EXEMPT FROM EXECUTION—ACTUAL AND CONTINUED CHANGE OF POSSESSION NECESSARY.—A sale of personal property is void, as against creditors of the vendor, unless followed by an actual and continued change of possession, although such property was exempt from execution in the hands of the vendor. The right of exemption is a personal privilege, which, if not claimed, is waived by the debtor.

APPEAL from a judgment of the superior court of Humboldt county, entered in favor of the plaintiff, and from an order denying the defendant a new trial. The opinion states the facts.

James Hanna, P. F. Hart and *E. W. Wilson*, for the appellant.

W. W. Brumfield, for the respondent.

ROSS, J. The plaintiff sued for the conversion of certain personal property by the defendant, alleged to have been at the time, and since, the property of the plaintiff. Plaintiff claims to have purchased the property from James N. Barton, but the evidence shows that the pretended sale was not followed by an actual or continued change of possession. The court below, however, held, as matter of law, that the property in question was exempt from execution in the hands of the vendor, James N. Barton, and, therefore, "the sale was valid between the parties and all creditors, whether followed by continued change of possession or not." In this the court was in error. The right of exemption is a personal privilege, which, if not claimed, is waived by the debtor. Besides, a part of the property in question would not have been exempt under the statute in the hands of the debtor.

Judgment and order reversed and cause remanded for a new trial.

MCKEE, J., and MCKINSTRY, J., concurred.

No. 11,015.

HALL *v.* SUPERIOR COURT OF EL DORADO COUNTY.

In Bank. Filed November 19, 1885.

APPEAL FROM JUSTICE'S COURT—TIME IN WHICH TO PERFECT—ORDER OF FILING NOTICE AND BOND IMMATERIAL.—Where a notice of appeal from a justice's court is served and filed, and the undertaking on appeal is filed, within the time prescribed by statute, the superior court obtains jurisdiction, and cannot dismiss the appeal for want of jurisdiction. The mere order in which the acts, necessary to the perfection of the appeal, are done, is immaterial, when done within the time limited by the statute.

APPLICATION for a writ of *certiorari*. The opinion states the facts. The prior opinion is reported in 7 West Coast Rep., 506.

George C. Blanchard and *Chas. A. Swisler*, for the petitioner.

Irwin & Irwin, for the respondent.

MORRISON, C. J. The opinion and orders heretofore filed herein are vacated and set aside, and the following will stand as the opinion and judgment of the court:

Application for a writ of *certiorari*

The petition in this case sets forth that on the fourteenth day of June, 1884, one William Went recovered a judgment against petitioner in a justice's court in the county of El Dorado, for a sum of money therein stated. That on the twenty-third day of June a notice of appeal in said case was served, and filed on the following day, and on the twenty-eighth of June, 1884, a bond on appeal was duly filed.

The petition alleges that the appeal was in all respects regular and according to law, but that on the eleventh day of February, 1885, the cause was brought on for hearing before the superior court of El Dorado county, when a motion was made to dismiss the appeal which was granted on the grounds, as the order of dismissal shows, "that the notice of appeal was served on the twenty-third day of June, 1884, and filed on the twenty-fourth. That the bond was filed on the twenty-eighth."

There is no doubt that the reasons assigned by the court for making the order of dismissal were wholly insufficient. The notice of appeal was given in time, was filed in time and so was the bond filed within the time fixed by law. All of these questions were before the court and decided in the case of Coker v. The Superior Court of Colusa County, 58 Cal., 177. It was there held that "to effectuate an appeal from the judgment of a justice of the peace, three things are necessary, viz.: The filing of a notice of appeal with the justice, the service of a copy of the notice upon the adverse party and the filing of a written undertaking; and all these must be done within thirty days after the rendition of the judgment: Sections 974, 978, code of civil procedure." Here the notice of appeal was served and filed, and the undertaking on appeal was filed within the time prescribed by the statute, but not in the order named in the statute. The mere order in which the acts are done is not material, but when done within the time limited the appeal is perfected: Coker v. Superior Court, *supra*.

The Coker case is very much in point and settles the question that the appeal was improperly dismissed on the grounds stated in the order of dismissal.

We have shown that the appeal was regularly taken according to the provisions of the code, and the case was, therefore, properly in the superior court for trial. Had that court the right to dispose of the appeal in the summary manner in which it did, or was it not the duty of the court under the circumstances to dispose of the case on its merits? This court said, in the case of Levy v. Superior Court of Yolo County, 5 West Coast Rep., 127: "That court, the superior court, can neither give to itself jurisdiction by holding an insufficient undertaking sufficient, nor divest itself of jurisdiction by holding a sufficient bond insufficient."

Neither could the superior court in the case now before us divest itself of the jurisdiction properly vested in it by the appeal, by an arbitrary order dismissing the appeal in the manner complained of.

From the facts appearing in the petition the court erred in dismissing the appeal; therefore, the alternative writ prayed for should issue.

So ordered.

MYRICK, J., THORNTON, J., and MCKEE, J., concurred.

No. 8,516.

JAMISON ET AL. *v.* SIMON ET AL.

Department One. Filed November 19, 1885.

VERBAL SALE—STATUTE OF FRAUDS—RECEIPT AND ACCEPTANCE BY BUYER.—Under section 739 of the civil code, a verbal contract for the sale of personal property, for a price of two hundred dollars or more, is invalid, when no part of the price is paid at the time of sale, unless the buyer accepts and receives part of the thing sold. A mere receipt without an acceptance is not sufficient to take the contract out of the statute of frauds.

APPEAL from a judgment of the superior court of Merced county, entered in favor of the plaintiffs, and from an order denying the defendants a new trial. The opinion states the facts.

John C. Burch, for the appellants.

W. L. Dudley and *R. H. Ward*, for the respondents.

ROSS, J. This action was brought to recover damages alleged to have resulted to the plaintiffs by reason of the breach by the defendants of a contract for the sale of a certain lot of wool. The contract was oral and no part of the price was paid. Under such circumstances the contract is, by the statute, declared to be invalid unless "the buyer accepts and receives part of the thing sold:" Civil code, sec. 1,739. "There must be not only a delivery of the goods by the vendor," said the court of appeals of New York: 47 N. Y. 452; "but a receipt and acceptance of them by the vendee liable for the price; and this acceptance must be voluntary and unconditional.

Even the receipt of the goods, without an acceptance, is not sufficient. Some act or conduct on the part of the vendee, or his authorized agent, manifesting an intention to accept the goods as a performance of the contract, and to appropriate them, is required to supply the place of a written contract." By the terms of the contract in the present case the wool was to be delivered by the plaintiffs to the defendants at the railroad depot in Merced; but, as has been seen, until there was a receipt and acceptance on the part of the vendee, the contract was invalid in law. That the wool was not accepted on the part of the defendants because of its alleged dampness, clearly appears from the evidence. Indeed, the objection of defendants' agent to accepting the wool is admitted in a letter put in evidence, from the plaintiff, Jamison, to his co-plaintiff, Stewart, in which Jamison says: "The wool is damp. Mr. Simon wants me to discount twenty-five pounds on the bale. I am not willing to do it. We have agreed to wait eight or ten days after the rain is over, to weigh the wool if the dampness is all out of it." The evidence further shows that at the expiration of the time agreed on Simon still refused to accept the wool, and the plaintiffs then sold it in Merced at the highest price obtainable, and brought this suit to recover the difference between the amount realized by the sale and the amount the wool would have brought at the price fixed in the oral agreement with the defendants. But as there was no acceptance of the property on the part of the defendants the case comes within the statute of frauds, and the action cannot be maintained.

Judgment and order reversed and cause remanded.

McKEE, J., and MCKINSTRY, J., concurred.

No. 8,597.

PETERSON *v.* LAURETZEN.

Department Two. Filed November 19, 1885.

RIGHT OF WAY—AGREEMENT FOR—PAROL EVIDENCE OF TRESPASS—FRAUD.—Plaintiff and defendant held land in common, the defendant had used the right of way in question for some time, when they entered into an agreement for the partition of the land; the defendant agreed to accept a certain portion of the land as his share, provided the right of way claimed went with it; the plaintiff promised that it should, and that he would procure deeds in which that right should be reserved; the defendant relied upon the promise of the plaintiff in the matter, but by the fraudulent conduct of the plaintiff, the partition deeds omitted to reserve to the defendant the right of way. In an action to recover for a trespass by the defendant, in tearing down a fence erected by the plaintiff, over such way, the defendant answered by setting up such agreement and the fraudulent conduct of the plaintiff. *Held*, that parol evidence of the same was admissible, and that the exclusion thereof was error.

APPEAL from a judgment of the superior court of San Luis Obispo county, entered in favor of the plaintiff, and from an order denying the defendant a new trial. The opinion states the facts.

D. S. Gregory and *F. Adams*, for the appellant.

McD. R. Venable, for the respondent.

MORRISON, C. J. This is an action for damages based upon an alleged trespass committed by defendant on plaintiff's lands by tearing down and destroying a fence erected thereon by plaintiff. The tearing down of the fence is admitted, but it is claimed that it was erected by plaintiff across a road which the defendant traveled and had a right to travel, leading over the plaintiff's land to those of defendant.

The answer sets up that in May, 1876, plaintiff and defendant entered into an agreement to purchase the land in question of one Bayer, and thereupon the plaintiff entered into possession of the entire tract, and that while in possession and holding the same for their joint benefit, plaintiff and defendant entered into an agreement to partition the tract in certain proportions stated in the answer, and thereupon, the plaintiff undertook and agreed to procure deeds partitioning and conveying the land in severalty accordingly, and also granting to defendant the right of way claimed by him.

That defendant trusted in the honesty and good faith of plaintiff in the matter, and on the first day of February, 1877, plaintiff procured the deeds of partition which were executed in accordance with the agreement except as to the right of way, which it is charged plaintiff fraudulently caused to be omitted from defendant's deed to said land; other allegations of bad faith and fraud in connection with the alleged right of way are charged in the answer against plaintiff, all of which are found by the court to be untrue, the court having excluded the defendant's evidence. On the trial judgment passed for plaintiff and the court awarded five dollars damages.

The contention on the trial was about the so-called right of way claimed by the defendant over the plaintiff's land, and if no such right was established or attempted to be proved on the trial, the determination of the court below was correct. It is shown in the evidence that the way by the road fenced by plaintiff had been used for some time by defendant, and was necessary for the purpose of access to his portion of the land. And it further appears that it was a part of the agreement under which the land was partitioned, that the defendant should be reserved the right of way claimed by him over the land of the plaintiff by the deed of partition. The plaintiff undertook to procure the deed of partition to himself and the defendant, promising that the right of way should be provided for in those deeds, but, by what is declared to be his fraud, the right of way was omitted. All of this matter the defendant attempted on the trial to prove by parol, but the court excluded the evidence holding that the matter was provable only by a written instrument.

In this we think the court erred. The parties held the land in common; this defendant had used the right of way in question for some time before they made a contract or agreement for the partition of the land, the defendant agreed to accept a certain portion of the land as his share, provided the right of way claimed went with it; the plaintiff promised that it should, and that he would procure

deeds in which that right should be reserved; that the defendant relied upon the promise of the plaintiff in the matter, and that by the fraudulent conduct of plaintiff the partition deeds omitted it. We think that under the foregoing facts, the evidence offered was admissible, and that the court erred in excluding it: 1 Greenleaf on Evidence, sections 284, 296.

Judgment and order reversed.

MYRICK, J., and THORNTON, J., concurred.

No. 9,127.

WYRICK ET AL. *v.* WICK ET AL.

Department One. Filed November 19, 1885.

ACTION TO DECLARE TRUST—NOTICE OF PLAINTIFF'S EQUITIES—BURDEN OF PROOF.—In an action against the holders of the legal title to land, to charge them with a trust in favor of the plaintiff, when the complaint expressly alleges that the defendants, at the time of their purchase, took with notice of the plaintiff's equities, it is necessary for the plaintiff to prove facts showing such notice, when there is nothing shown of record to put the defendants on inquiry.

APPEAL from a judgment of the superior court of Humboldt county, entered in favor of the defendants. The opinion states the facts.

Moore, Laine & Johnson, for the appellants.

J. J. De Haven and *James Hanna*, for the respondents.

ROSS, J. The complaint charges, in substance, that, in the year 1858, Jacob Wyrick located the land in controversy under the state laws, and received therefor a certificate of purchase; that he subsequently died, leaving surviving him his widow and certain children, who are plaintiffs in this action; that subsequently the widow attempted to sell and assign the certificate of purchase to one Devenish, who, by means of the pretended assignment and payment of the balance of the purchase money, procured a patent from the state conveying to him the said land, and that the title thus conveyed to Devenish was taken by him in trust for the heirs of Wyrick. The complaint then alleges that subsequently Devenish "sold, and by his deed of that date (January 28, 1870), by him signed, sealed, acknowledged and delivered, granted and conveyed to Frank A. Weck, one of the defendants herein, the whole of the south half of the southwest quarter, etc., and the plaintiffs allege, upon their information and belief, that the said Weck, at the time he purchased said land and took said conveyance, did so with full knowledge and notice of all the facts herein alleged, and particularly with notice that the said land had been located by Jacob Wyrick, and that he had received (after the payment of the twenty per cent of the purchase money and one year's interest in advance) the state certificate of purchase, and that said Wyrick died at the time hereinbefore alleged, leaving him surviving his said wife and children, the plaint-

iffs herein, as his sole heirs at law." Similar allegations in respect to notice are made as to the other defendants, all of which were fully denied by the defendants.

On the trial, the plaintiffs proved the location of the land by Jacob Wyrick; the issuance of the certificate of purchase to him; his subsequent death, leaving the plaintiffs his heirs at law; that the widow subsequently executed a pretended assignment of all her interest in the certificate of purchase to Devenish, who, upon the certificate so assigned and payment of the balance of the purchase money, obtained a patent from the state, conveying to him, in his individual name, the premises in dispute. And then the plaintiffs rested, without any proof of the allegations of the complaint in respect to notice on the part of defendants of plaintiff's equities. The court below gave judgment of nonsuit, which is here claimed to have been error.

It is said that the defense of a *bona fide* purchaser without notice is in the nature of new matter, the burden of proving which is upon the defendant. Ordinarily this is so. But here the plaintiffs allege that the defendants hold the legal title to the property, derived through the deed from Devenish, the patentee, and, to charge them with the trust, expressly allege that at the time of their purchase they took with notice of the plaintiff's equities. The proof on the part of plaintiffs was devoid of any fact tending to show notice on the part of defendants of plaintiffs' rights. There was nothing of record to put them on inquiry. The patent upon its face showed that the land was granted to Devenish, from whom defendants purchased, as is expressly charged in the complaint. If there were matters *en pais* tending to show notice of plaintiffs' rights at the time of such purchase, as is also charged in the complaint, it was necessary for the plaintiffs to make the proof; for without such proof the title must remain where plaintiffs have alleged it to be, in defendants: Code of civil procedure, sec. 1,981.

Judgment affirmed.

MCKINSTRY, J., and MCKEE, J., concurred.

No. 8,469.

MYRES v. SURRYHNE.

Department One. Filed November 19, 1885.

REAL ESTATE BROKER—AGREEMENT FOR EMPLOYMENT OF MUST BE IN WRITING.—Under subdivision 6 of section 1,624 of the civil code, a real estate broker cannot recover reasonable compensation for services performed by him, in bringing about an exchange of real property, for the defendant, unless the agreement, authorizing the plaintiff to perform such services, was in writing, subscribed by the defendant.

APPEAL from a judgment of the superior court of Alameda county, entered in favor of the defendant, and from an order denying the plaintiff a new trial. The opinion states the facts.

W. H. Allen, for the appellant.

Vrooman & Davis and *Edward Lynch*, for the respondent.

THE COURT. The case arises out of an action to recover a reasonable compensation for services alleged to have been rendered by the plaintiff's assignor, as a real estate agent, in bringing about an exchange of certain real properties for the defendant.

On the trial of the issue framed by the complaint and answer, plaintiff gave in evidence a book, kept by the real estate agent, in which he or his clerk entered memoranda of real properties for sale or exchange. The book shows a memorandum which, it was proved, was furnished by the defendant and transcribed on the book by the clerk of the agent. The memorandum was as follows:

"Exchange, Oakland property. Twenty-five thousand dollars. In the margin, left hand margin, 'block 690 and a part of block 511 and a part of block 527, with good improvements, nine houses, barn, coal yard, lumber yard, with all the fixtures necessary for a first class business, with a mortgage of six thousand dollars; Brandon, agent. *Surryhne, owner.*'" Appended to this entry there was a diagram of the property, showing the location of the blocks and the streets by which they were bounded.

It was not claimed, nor is it now, that this memorandum constituted a contract or a note, or memorandum of a contract for the payment of compensation or commission to the agent. But in connection with it, the plaintiff asked of a witness "to state what services, if any, was performed by the agent in procuring an exchange of real estate between defendant and Mr. Tinson." To that the defendant objected unless the plaintiff proposed to show a contract in writing between the defendant and the real estate agent for the alleged services. Upon an intimation by the court that the objection would be sustained, unless written authority was shown, plaintiff made the following offer:

"We offer to prove that plaintiff's assignor was employed by defendant, as stated in the complaint, to perform and did perform the services mentioned in the complaint; that in fact he did perform such services, and the value thereof was and is six hundred dollars; that there was no contract, agreement or memorandum in writing subscribed by defendant or his agent, employing or authorizing plaintiff's assignor to make such sale or exchange, or do or perform the acts specified in the complaint, other than said book." Defendant objected to the offer, and the court, against plaintiff's exception, sustained the objection, on the ground that there was no contract in writing subscribed by the defendant, as required by subdivision 6 of section 1,624, of the civil code.

The ruling is sustained by McCarty v. Loupe, 62 Cal., 299; Pacific Land and Trust Company v. Blockman, xi. Pac. C. L. J., 24, and Schuller v. Farquarson, 5 West Coast Rep., 583; and upon the authority of those cases the judgment and order appealed from are affirmed. Motion to dismiss appeal denied.

No. 7,146.

KENNEDY v. GIFT.

Department Two. Filed November 19, 1885.

WILLFUL COLLECTION OF ILLEGAL FEES—ACCUSATION FOR—FINDINGS.—In an action under section 772 of the penal code, upon a verified accusation against the defendant, charging him as constable, with knowingly and willfully collecting of plaintiff illegal fees; *held*, that the findings were sufficient, and that the designation of them as the "decision," was immaterial.

APPEAL from a judgment of the superior court of Contra Costa county, entered in favor of the defendant.

A. H. Griffith, for the appellant.

E. J. Emmons, for the respondent.

THE COURT. This is an action under section 772 of the penal code, upon a verified accusation against defendant, charging him as constable, with knowingly and willfully collecting of plaintiff illegal fees.

We have examined the record. The facts material to the issue are found in the paper entitled "Decision," printed in the transcript, and we are of opinion that they are correctly found, and that the proper conclusion of law is deduced therefrom.

The court committed no error in refusing to file any other findings than those above referred to.

Judgment and order affirmed.

No. 11,123.

SHARON v. SHARON.

Department Two. Filed November 20, 1885.

PAST ILLICIT COHABITATION—DEFENSE OF MUST BE SPECIALLY PLEADED—FINDINGS.—In an action to recover on an agreement in writing for the payment of money, a defense that the agreement was given in consideration of past illicit cohabitation, if relied on by the defendant, must be pleaded by him when the same does not appear in the complaint. If not pleaded, he cannot give evidence that such was the consideration; and a finding thereon is without the issues, and will be disregarded on appeal.

PROMISE TO CEASE ANNOYANCE A SUFFICIENT CONSIDERATION.—A promise by one person to cease to disturb, or annoy, or to make any demands upon another, is a sufficient consideration to support an agreement by the latter to pay money to the former.

APPEAL from a judgment of the superior court of the city and county of San Francisco, entered in favor of the plaintiff. The opinion states the facts.

W. H. L. Barnes and *Oliver P. Evans*, for the appellant.

Tyler & Tyler and *D. S. Terry*, for the respondent.

MYRICK, J. Action on an agreement in writing. The agreement is in the following words:

"PALACE HOTEL, SAN FRANCISCO, Nov. 7, 1880.

"I hereby agree to pay Miss S. A. Hill, two hundred and fifty dollars for each and every month of the year, A. D. 1883.

"WM. SHARON."

The defendant admitted the execution and delivery of the writing to plaintiff, and that he had not paid the installments alleged to be due for October, November and December, 1883; and averred that to induce plaintiff to desist from making unwelcome visits and annoying and disturbing him in his rooms, and on the consideration that she would cease to disturb or annoy him, or make any demands upon him, he promised to pay her seven thousand five hundred dollars, and in pursuance of that promise he paid her three thousand dollars, gave her his note for one thousand five hundred dollars, which has been paid, and gave her the paper set out in the complaint. The answer contains the statement that the defendant "denies that there ever was any consideration for the note" sued on.

The case comes up on the judgment roll, without the evidence. The court found:

"That said instrument was given by defendant to the plaintiff in consideration of past illicit intercourse between them, and also in consideration of a promise then and there made by plaintiff to defendant to make no further demand upon defendant, and not to further annoy him in any manner, and also in consideration of the following instrument in writing:

"'Received of William Sharon seven thousand five hundred dollars, in full of all claims and demands of every name, nature and character. S. A. HILL.'"

The defendant on this appeal presents the point, that as the court found a portion of the consideration to be past illicit cohabitation, the entire contract is void under sections 1,607, 1,667, and 1,608, civil code; and after claiming that the illegality of the consideration was sufficiently pleaded by the denial of any consideration, cites Oscanyan v. Winchester R. A. Co., 103 U. S., 261, as authority that the defense need not be specially pleaded, but could be interposed under the general issue.

It, doubtless, has been, and is, the rule, that a contract in consideration of future illicit cohabitation is void. It seems to have been the rule formerly, that a contract, under seal, for past illicit cohabitation, could not, for that reason, be avoided; but that a written contract not under seal could be avoided. The distinction may, perhaps, have been done away with by the code.

In commenting on a contract under seal, it is said in 1 Story on Contracts, sec. 541, "the contract, for past acts, is done, and may otherwise be remediless; and there is no principle of law which forbids a party to redress a past injury, or atone for a wrong which he has already committed;" and the writer continues, "if the consideration be illegal, the contract may be avoided by a proper plea, even though it be a specialty, and the illegality be not apparent on the face of the instrument."

Without deciding that a contract to pay money for past illicit cohabitation can be enforced or avoided under a proper plea, we are of opinion that the defense was not pleaded in this case, and was

not in the issues, and the finding of the court, in that respect, should, therefore, be disregarded.

The case of Oscanyan v. W. R. A. Co., above cited, was decided on the plaintiff's statement, and the points involved were necessarily presented by him in endeavoring to make out a case; and it was held that he could not recover. The necessity of pleading the defense by the defendant was not in any manner involved in the case.

In the case at bar, there is nothing in the case as stated in the complaint to suggest any illegal consideration; the defendant admitted the execution and delivery of the writing, and stated the consideration to be that she should cease to disturb or annoy him, or make any demands upon him. The defendant, doubtless, studiously avoided pleading illicit cohabitation. He was, under our system of pleading, bound by the omission, and it was not competent for him to give in evidence the matters omitted.

The judgment is affirmed.

Ordered that this judgment be entered as of November 12, 1885.

MORRISON, C. J., and THORNTON, J., concurred.

No. 8,567.

BURKE v. LEVY ET AL.

Department Two. Filed November 20, 1885.

FINDINGS NOT DISTURBED WHEN EVIDENCE IS CONFLICTING.—Where the evidence as to whether a transfer of property was a sale or as security, is conflicting, the findings will not be disturbed.

PLAINTIFF CANNOT CONTRADICT AVERMENTS OF COMPLAINT.—Where, in an action to recover damages for abuse of the process of the court, the complaint alleges the fact of a judgment, not averring it to be void, the plaintiff cannot maintain the position that such judgment was void by reason of defective service of summons. Such position is inconsistent with the case presented in the complaint.

APPEAL from a judgment of the superior court of San Mateo county, entered in favor of the defendants, and from an order denying the plaintiff a new trial. The opinion states the facts.

A. A. Pardow and *A. D. Splivalo*, for the appellant.

Fox & Ross, for the respondents.

MYRICK, J. The cause of action, as stated in the complaint, is, in substance, as follows:

Defendants commenced an action against plaintiff, and had property attached; the plaintiff sold and delivered the property to defendants in payment of the debt, and defendants agreed to dismiss that suit; instead, however, of dismissing the suit, the defendants, contriving to oppress, cheat and defraud plaintiff, procured a judgment to be entered in the action against him, and had his property seized and sold under execution; and this action was brought to recover the value of the property so seized, and damages, under section 3,294, civil code. On the issues raised by the answer, the

cause was tried, and the court found that the property attached was not transferred in payment, but as security, and that it was subsequently destroyed by fire, leaving the debt unpaid without security, and that the subsequent judgment, seizure and sale were regular and proper; and judgment was thereupon rendered in favor of defendants.

The evidence given as to whether the transfer was a sale or as security was conflicting; therefore, we do not disturb the findings.

In this court, for the first time, the plaintiff raises the point that the judgment in the former suit was void by reason of defective service of the summons. That position is inconsistent with the case presented in his complaint. The complaint states the fact of the judgment, not averring it to be void, and counts on abuse of the process of the court. If the judgment had been deemed void by plaintiff, quite another form of action would have been brought.

"The plaintiff must recover, if at all, upon the cause of action as set out in his complaint, and not upon some other which may be developed by the proofs:" Mondrau v. Goux, 51 Cal., 151.

Judgment and order affirmed.

THORNTON, J., and MORRISON, C. J., concurred.

No. 8,624.

GARIDO *v.* AMERICAN CENTRAL INS. CO. OF ST. LOUIS.

Department Two. Filed November 20, 1885.

FIRE INSURANCE—ACTION ON POLICY MUST BE BROUGHT WITHIN TIME LIMITED.—In an action on an insurance policy, which contains a clause that any suit or action thereon should be commenced within twelve months after the loss; *held*, that the evidence did not sustain a finding that the delay in bringing the present action was caused by the conduct of the defendant; that, after the plaintiff had been informed of the position of the defendant, he had ample time, within the year, to commence his action.

APPEAL from a judgment of the superior court of Contra Costa county, entered in favor of the plaintiff, and from an order denying the defendant a new trial. The opinion states the facts.

Sidney V. Smith & Son, for the appellant.

Mills & Jones and *Warmcastle & Bowie*, for the respondent.

MYRICK, J. Action on an insurance policy. The property insured was destroyed February 15, 1880. The assured gave immediate notice of the loss, and as soon thereafter as practicable made proofs as required by the policy. The complaint was filed November 1, 1881. The policy contained the clause that any suit or action thereon should be commenced within twelve months next after the loss. The action not having been commenced until nearly two years after the fire, the plaintiff endeavored to prove, and claims, and the court below found, that in and about negotiations for a compromise, the conduct of the defendant was such that it impliedly agreed to suspend the clause above referred to, and that the defendant held ou

hopes that an adjustment would be made, and induced the plaintiff and the assured to delay bringing the suit within one year after the loss.

Admitting that the agent, Snow, had full authority, we do not think there is evidence upon which to base the above findings. On the contrary, we think the plaintiff acted entirely upon his own judgment and that of his attorney.

Whatever may have been the effect of the negotiations prior to January 21, 1881, on that day plaintiff was distinctly informed of the position of the defendant. This was in ample time to commence the suit.

Judgment and order reversed and cause remanded for a new trial.

THORNTON, J., and MORRISON, C. J., concurred.

No. 8,312.

TAYLOR v. SOLDATI.

Department Two. Filed November 20, 1886.

LEASE IN WRITING—VERBAL AGREEMENT FOR ALTERATION OF TERMS—WHEN NOT BINDING ON GRANTEE.—A verbal agreement between the lessor and lessee, by which the terms of a written lease are altered, if not acted upon by the lessee until after the lessor had conveyed his estate, is not binding upon the grantee of the lessor.

APPEAL from a judgment of the superior court of Marin county, entered in favor of the defendant, and from an order denying the plaintiff a new trial. The opinion states the facts.

D. H. Whittemore and *George W. Towle, Jr.*, for the appellant.

D. M. Sexton, for the respondent.

MYRICK, J. Mrs. Velasco leased to Soldati a tract of land with sixty cows, for the term of from July 11, 1876, to October 1, 1879. In the lease it was agreed that Soldati should not have the right to pasture any stock of any kind on the premises, other than the sixty cows, except the necessary horses to use in the dairy business. January 6, 1879, Mrs. Velasco sold the leased property to plaintiff. From January 26, to October 1, 1879, Soldati pastured twenty-five cows and other animals on the land, other than the sixty cows leased. This action was brought to recover for the pasturage of the extra animals.

The defendant was permited to prove, against plaintiff's objection that while Mrs. Velasco was the owner, she and defendant made a verbal agreement by which he might pasture the extra animals; and the court instructed the jury that such verbal agreement was binding on the plaintiff. This was error. "A contract in writing may be altered by a contract in writing, or by an executed oral agreement, and not otherwise:" Section 1,698, civil code. The agreement to pasture the extra animals without charge, was made while

Mrs. Velasco was owner, but was not acted upon until after she conveyed to plaintiff, therefore, her verbal agreement would not bind him.

The court also instructed the jury that if Mrs. Velasco and Soldati made an agreement by which the latter might pasture the extra cattle without charge, the defendant was entitled to a verdict. For the reasons above given, this was error.

Judgment and order reversed, and cause remanded for a new trial.

MORRISON, C. J., and THORNTON, J., concurred.

No. 8,257.

HUNTINGTON, ADMINISTRATRIX, ETC., *v.* RUSSELL ET AL.

Department Two. Filed November 20, 1885.

AGREEMENT TO CARRY ON BUSINESS CONSTRUED.—Under the agreement mentioned in the opinion, *held*, that the defendant was not bound to carry on the business in question, for any particular time.

APPEAL from a judgment of the superior court of San Luis Obispo county, entered in favor of the defendant. The plaintiff's intestate and the defendant Russell were partners in business. On February 21, 1880, the defendant Russell purchased his partner's interest in the business for four thousand dollars, and at the time agreed to pay a further sum of seven hundred and fifty dollars, if, in the opinion of the other defendants, the profits from the business justified him in so doing. This matter was to be definitely decided within three years. Russell sold out the business soon after, and the other defendants decided that the profits were not sufficient to bind him to the further payment. This sale and decision, the plaintiff alleged, was the result of a fraudulent conspiracy between the defendants.

Wm. Leviston and *J. M. Wilcoxon*, for the appellant.

Wm. J. Graves and *Ernest Graves*, for the respondents.

MYRICK, J. There is nothing in the agreement made between Huntington and Russell by which Russell was bound to continue the business for any particular time; it was, in effect, that if he *should* carry it on with certain results he would pay Huntington a certain sum. There is no fact stated in the complaint which shows that at the time Russell sold out the business it was sold for less than its then value, or that at that time it did not appear advisable to him and his co-defendants to sell. The demurrer was properly sustained.

Judgment affirmed.

THORNTON, J., and MORRISON, C. J., concurred.

No. 9,132.

KENDALL v. WATERS ET AL.

Department Two. Filed November 20, 1886.

FINDINGS—EVIDENCE WHEN PRESUMED IN SUPPORT OF.—The sufficiency of the evidence to sustain the findings will not be considered on appeal, when the evidence is not before the court. In such case evidence in support of the findings is presumed.

ONE PERSON CANNOT ENTER UPON THE POSSESSION OF ANOTHER for the purpose of pre-emption.

FINDINGS NOT REQUIRED WHEN DEMURRER HAS BEEN SUSTAINED.—No findings are required on issues presented by a cross-complaint, to which a demurrer has been sustained, and no amendments made.

APPEAL from a judgment of the superior court of Contra Costa county, entered in favor of the plaintiff. The opinion states the facts.

Burnett & Newman and *L. Quint*, for the appellant.

Mills & Jones, for the respondents.

MYRICK, J. Ejectment: The plaintiff alleged possession in himself, on the first of November, 1881, of certain tracts of land, and ouster by the defendants on that day, and that they withhold the lands from plaintiff. The answers of the defendants denied the possession of plaintiff, denied the entry of defendants and ouster by them, and denied that they withhold the premises from him.

The defendants added to their answers respectively cross-complaints, to which cross-complaints demurrers were filed and sustained, and the defendants did not avail themselves of leave to amend.

The cause was tried on the complaint and answer and judgment rendered for plaintiff. The evidence is not before us; therefore, we cannot consider any question relating to its sufficiency.

The facts stated in the cross-complaints constituted no defense to the action; therefore, the demurrers were properly sustained.

It is not an open question that one person cannot enter upon the possession of another for the purpose of pre-emption.

The plaintiff declared on prior possession; therefore, under the denials of the answers, the defendants could have offered all the evidence they had tending to show that they had possession prior to the plaintiff; we must presume they attempted to make proof of such possession and failed.

It is scarcely necessary to say that the court did not err in omitting to find on the issues presented in the cross-complaints. The demurrers having been sustained, and no amendments made, the matters stated in the cross-complaints were not in issue to be determined by the trial court.

Judgment affirmed.

THORNTON, J., and MORRISON, C. J., concurred.

No. 9,977.

ADAIR *v.* CRANE ET AL.

Department Two. Filed November 20, 1885.

ORAL AGREEMENT AS TO DIVISION LINE.—Adjoining proprietors may orally agree between themselves that a certain fence shall be and constitute the division line between their lands.

THE ADMISSION OF IMMATERIAL EVIDENCE, IF WITHOUT INJURY to the party complaining, will not warrant a reversal.

APPEAL from a judgment of the superior court of Ventura county, entered in favor of the defendants, and from an order denying the plaintiff a new trial. This was an action of ejectment, in which the defendants set up an equitable title to the land west and north of a certain wire fence, based upon an oral agreement establishing a division line between plaintiff and defendants. On the trial, the witness Criss was permitted to testify, against the plaintiff's objection, as to the general understanding in the community as to the division line, and that he had never heard of the same being questioned.

L. C. McKieby and *Williams & Williams*, for the appellant.

Blackstock & Shepherd, for the respondents.

THE COURT. 1. There is evidence to sustain the finding as to the agreement of the parties that the wire fence should be the division line. It was competent for the parties to make such an agreement.

2. It is not manifest that any injury occurred from the refusal to strike out the testimony of the witness Criss.

We see no error in the transcript.

Judgment and order affirmed.

No. 8,010.

HEINLEN *v.* FRESNO CANAL AND IRRIGATION COMPANY.

In Bank. Filed November 21, 1885.

RIPARIAN PROPRIETOR—ACTION FOR DIVERSION OF WATER—EVIDENCE OF INJURIES MUST BE CONFINED TO RIPARIAN LANDS.—In an action by an alleged riparian owner, to recover damages for injuries to plaintiff's lands and cattle by reason of a diversion of the waters of the stream, evidence of injuries to land not specified in the complaint, or to lands and to cattle pastured thereon, not bordering on the stream, is inadmissible.

DEFENSE OF STATUTE OF LIMITATIONS MUST BE FOUND ON.—In such action, the failure of the court to find on the defense of the statute of limitations is error.

APPEAL from a judgment of the superior court of Fresno county, entered in favor of the plaintiff, and from an order denying the defendant a new trial. The opinion states the facts.

H. S. Dixon, W. D. Tupper and *D. S. Terry*, for the appellant.

G. A. Heinlen, Axtell & Bradley and *Bennett & Wigginton*, for the respondent.

MYRICK, J. Action to enjoin defendant from diverting the water of Kings river, and for damages for injuries to plaintiff's lands and cattle by reason of alleged prior diversion. The lands averred and proved by plaintiff as being his lands were swamp and overflowed lands, title to which was derived from the state by patents of separate parcels, issued at different times, from November, 1870, to April, 1877. The plaintiff had judgment awarding the injunction and for eleven thousand dollars damages.

Whatever may be the rights of plaintiff as a riparian owner, the judgment in this case will have to be reversed.

1. The court permitted plaintiff to prove title in himself to parcels of land not bordering on any stream. Taking the testimony offered by plaintiff at its best in his favor, there is no evidence of a defined channel or stream of water through any of plaintiff's lands except through sections 1, 12, 13 and 24, township 19 south, range 19 east, and across a corner of section 31, township 19 south, range 20 east. In addition to proof of title in plaintiff of lands in the above enumerated sections, the court admitted evidence of title in plaintiff of portions of sections 2 and 11, township 19 south, range 19 east, and portions of sections 1, 4, 5, 6, 7, 8, 9, 12, 16, 17, 18, 20, 21, 27, 28, and 34, township 19 south, range 20 east. The patents to these lands, in cases where patents had been issued, were of various dates, as above stated, from November, 1870, to April, 1877. Of these parcels some were at least five miles, others at least three miles, others at least two miles, and others at least one mile from the stream; some were more than five miles, others more than two miles from any lands of plaintiff bordering on the stream. Some, not bordering on any stream, were entirely disconnected by more than two miles in distance from any other lands of plaintiff. And in connection with such proof the court permitted the plaintiff to give evidence of injuries caused by defendant's diversion to the lands, and to cattle pastured on the lands, not bordering on the stream.

2. The court permitted plaintiff to prove title to several tracts of land not set forth in his complaint.

3. The defendant pleaded five years' adverse diversion and appropriation; and its evidence tended to support the plea. The court did not find on this issue.

It is unnecessary to pass on the question of riparian rights, for the reason that, as the case must go back for a new trial, upon such new trial it may be found that there is no continuous stream through plaintiff's lands. The evidence offered on behalf of plaintiff is conflicting on this point.

Judgment and order reversed and cause remanded for a new trial.

ROSS, J., MORRISON, C. J., and MCKINSTRY, J., concurred.

MCKEE, J., CONCURRING. Because the court erred in admitting evidence of damages sustained by the plaintiff upon non-riparian lands, and in awarding him damages for the same, I concur in the judgment.

No. 8,656.

McDERMOTT *v.* S. F. & N. P. R. R. Co.

Department Two. Filed November 21, 1885.

NEGLIGENCE—CIRCUMSTANTIAL EVIDENCE—PROVINCE OF JURY—VERDICT.—In an action to recover damages for negligence, when the evidence thereof is circumstantial, it is the province of the jury to determine the facts and proper inferences from them, establishing the negligence. The verdict of the jury on such evidence should not be set aside unless when, in the judgment of reasonable men, no such deduction as that expressed in the verdict could be properly drawn from the facts in evidence.

APPEAL from a judgment of the superior court of Marin county, entered in favor of the plaintiff, and from an order denying the defendant a new trial. The opinion states the facts.

E. S. Lippitt and *W. S. Woods*, for the appellant.

Hepburn & Wilkins, for the respondent.

THORNTON, J. This is an action brought to recover damages for a loss by fire caused by the negligence of defendants.

It is argued that the evidence is insufficient to sustain the verdict, which was in plaintiff's favor. The testimony was of that character which must have been submitted to the jury. The testimony given in this case to prove negligence was circumstantial, and it was the province of the jury to determine the facts and all proper inferences from them, establishing the negligence alleged: Shafter v. Evans, 53 Cal., 32; Chidester v. Consol. Ditch Co., 59 Cal., 201; N. E. Glass Co. v. Lowell, 7 Cush., 321. The above rule we consider settled law in this state. The verdict of the jury on such evidence should not be set aside unless when, in the judgment of reasonable men, no such deduction as that expressed in the verdict could be properly drawn from the facts in evidence. The rule is so settled with us. See Chidester v. Consol. Ditch Co., *supra;* Fernandez v. Sacramento Co. R. R. Co., 52 Cal., 45; McKeever v. Market St. R. R. Co., 59 Cal., 300; Longenecker v. Pennsylvania R. R. Co., 105 Penn. St., 328; Beach on Contributory Negligence, sec. 161, and cases there cited.

We find nothing in this case which induces us to disturb the verdict on the ground of insufficiency of the evidence.

There is no error in the record, and the judgment and order denying a new trial must be affirmed.

MYRICK, J., and MORRISON, C. J., concurred.

WEST COAST REPORTER.

WHOLE No. 101. DECEMBER 3, 1885. VOL. VIII. No. 5.

CIRCUIT COURT, DISTRICT OF COLORADO.

HUMMEL, ADMINISTRATOR, *v.* MOORE.

November 12, 1885.

PLEADINGS—INCONSISTENT DEFENSES MAY BE SET UP IN ANSWER.—Under section 64 of the code of Colorado, inconsistent defenses may be interposed in an answer. Each defense must be complete in itself, and a full answer to the action, but it is not necessary that the several defenses should be harmonious throughout, or such as will admit of comparison and adjustment in respect to the facts alleged in them.

THE SAME—NONPAYMENT NEED NOT BE ALLEGED.—The complaint in an action on a promissory note, need not allege that it is unpaid; and, even if necessary, such negative averment cannot be met by denial.

REMOVAL OF CAUSES—JURISDICTION OF UNITED STATES COURT LIMITED BY RESTRICTIONS OF JURISDICTION OF STATE COURT.—The United States circuit court, in an action removed to it from a state court, is subject to the same limitations and restrictions respecting jurisdiction which obtain in the court from which it was removed. Thus, when the jurisdiction of the county courts of Colorado is limited to two thousand dollars, in an action removed therefrom to the United States circuit court, a counter claim exceeding such amount cannot be interposed.

ACTION on a promissory note. The opinion states the facts.

A. H. DeFrance, for the plaintiffs.

T. J. O'Donnell, for the defendant.

HALLETT, J. Action in the county court of Jefferson county on a promissory note made by defendant to plaintiff's testator to recover the sum of eight hundred and sixty-six dollars and sixty-five cents and interest. On defendant's application the suit was removed into this court, under the act of 1875, before issue. In this court defendant filed several answers denying specifically the matters alleged in the complaint; alleging want of consideration for the note, payment of the note and an agreement by the deceased payee to cancel and deliver up the note. Objection is made to the second, third and fourth defenses, in which the making of the note seems to be admitted, that they are not consistent with the first defense in which all allegations of the complaint are denied. This is met by the authority of People v. Lathrop, 3 Col., 448, in which it is held that inconsistent defenses may be interposed under section 64 of the code of this state. Each defense must be complete in itself and a full answer to the action.

But it is not necessary that the several defenses shall be harmonious throughout or such as will admit of comparison and adjustment in respect to the facts alleged in them. Plaintiff alleged in

his complaint that defendant had not paid the note except certain sums which were mentioned. In the first answer this allegation was answered in the following words: "Denies that defendant has not paid the sum." Plaintiff now moves to strike out those words on the ground that they are not consistent with other parts of the answer. Whether this be true or not, an issue as to payment of the note cannot be raised in that manner. It was not necessary to aver that the note was unpaid, and if necessary, a negative averment of that kind cannot be met by denial.

The words referred to may be struck out. In the fifth defense defendant seeks to set off against plaintiff's demand the sum of three thousand dollars, due from plaintiff's intestate for mining claims sold and conveyed to him by defendant. The sixth defense is similar, relying on a set off of three thousand dollars, without stating for what the money was due. In the seventh defense the charge is that plaintiff's intestate converted to his own use certain bonds of the Moore Mining and Smelting Company, belonging to the defendant, of the value of five thousand dollars. In conclusion, defendant demands judgment for these several sums, amounting to eight thousand dollars. By the constitution of the state, article 6, section 23, and by statute, general statutes, 243, the jurisdiction of county courts in civil cases is limited to two thousand dollars, and objection is made to the fifth, sixth and seventh defenses, that the amount demanded in each of them exceeds that sum. Upon this demurrer the question is, whether, in this court, the action is subject to limitations and restrictions respecting jurisdiction which obtain in the county court from which it was removed. It is conceded that in the county court defendant, as well as plaintiff, would not be admitted to present a claim or demand exceeding two thousand dollars, or, at any rate, if the claim should be for a larger sum, that he could ask for no more than two thousand dollars upon it: Pate v. Shafer, 9 Ind., 173; Murphy v. Evans, 11 Ind., 517.

But defendant contends that in this court the action is subject only to the jurisdiction of this court without reference to the jurisdiction of the county court, because it is provided in the act of 1875, 18 Stat., 471, that upon removal of a cause to a circuit court of the United States, and upon filing a copy of the record therein, "the cause shall then proceed in the same manner as if it had been originally commenced in the said circuit court." The language of the act is very general, but it must not be taken to enlarge the scope of an action removed from a state court into a circuit court. It is a general rule of civil procedure that in respect to the object of a suit and the relief to be granted in it, it will retain its character and individuality from beginning to end. The character of a suit and the limitations and restrictions affecting it when it is begun, remain with it in all jurisdictions through which it may pass. Accordingly, it was held in Louisiana, in a suit begun in a parish court for an amount exceeding the jurisdiction of that court and afterwards transferred to a district court of larger jurisdiction, that it could not be main-

tained in the latter court, because of the limitation in the court in which it was begun: Parker v. Shropshire, 26 La. An., 37. And in cases appealed from justices of the peace to courts of larger jurisdiction, limitations upon the jurisdiction of justices of the peace must be enforced in the appellate court: Allen v. Belcher, 3 Gilman, 594; Billingsly v. State, 3 Texas Ct. of App., 686; Cooban v. Bryant, 36 Wis., 605.

In all essential features the case is subject, in this court, to the limitations and restrictions which would have been applicable in the county court if it had not been removed into this court. The same law is to be administered and the same judgment to be given in this court as would have been recognized in the court of original jurisdiction; and inasmuch as the answers numbered five, six and seven could not be maintained in that court, they cannot be received in this.

The demurrer to those answers will be sustained.

SUPREME COURT OF WASHINGTON TERRITORY.

BROWN ET AL. *v.* RANK.

July Term, 1885.

DECISION ON DEMURRER TO ANSWER—CASE AT LAW—WRIT OF ERROR.—A decision, overruling a demurrer to an answer, which set up merely legal defenses, is a decision at law. Such decision must be brought to the supreme court for review on writ of error. If no errors are assigned, the proceeding will be dismissed.

MOTION to dismiss appeal. The opinion states the facts.

L. Holmes, for the appellant.

B. F. Dennison, for the appellee.

GREENE, C. J. Gazing at this motion to dismiss, we see but a single question necessary to its decision, namely, whether this cause is to be deemed one in equity or one at common law.

Our rules require an assignment of errors in a law, but none in an equity cause. Dismissal of the appeal would be the natural sequence of holding this to be a cause at law, for there is no assignment of errors here.

We gather from the record that the appellants, who were plaintiffs below, are seeking to open up a judgment rendered upon overruling a demurrer to the answer. In answering, defendant, besides denials, had pleaded four affirmative defenses, to the three last of which plaintiffs interposed a lumping demurrer.

Legal and not equitable, all these defenses are conceded to have been, unless the fourth, which was addressed to the judge and was apparently intended as a plea of equitable estoppel. Let the intent as to the last have been what it may, the matter pleaded did

not, in our opinion, display facts sufficient to constitute a defense of any description.

Jurisdiction is to be determined by presuming everything to be of common law cognizance, until the necessity for invoking equity jurisdiction appears.

Unless we are to give an unreasonable force to the address of the fourth defense to the judge, we are unable to see any necessity for him to act in the capacity of chancellor in deciding the demurrer.

Decision of the demurrer was, we think, a decision at law.

Getting the cause here for review of that decision is a proceeding in the nature of a writ of error.

Errors, therefore, should have been assigned conformably to rule v.

Appeal dismissed.

WINGARD, A. J., and TURNER, A. J., concurred.

MORGAN *v.* HENDERSON.

Filed July 22, 1885.

COVENANT OF QUIET ENJOYMENT—BREACH OF, HOW ALLEGED.—A covenant for quiet enjoyment is never broken until there has been some hostile assertion of a better title. Consequently, in an action to recover for such breach, an allegation that the grantor, at the time of making the deed, was not and never has been, the owner of the land granted, is insufficient to show a breach of the covenant.

APPEAL from the district court. The opinion states the facts.

Nash & Kinnard, for the appellant.

Bettis & Hyde, for the appellee.

HOYT, A. J. This action was brought to recover damages for a breach of the covenant for quiet enjoyment contained in a deed from the defendant to the plaintiff.

The court below sustained a demurrer to the complaint and rendered judgment for the defendant, and the plaintiff brings the cause here for review, and alleges as error the ruling of the court in so sustaining said demurrer.

The only statement of a breach of said covenant was an allegation in said complaint that the said defendant was not at the time of making said deed, and is not now, the owner of the land therein described.

Does this allegation show that said covenant has been broken?

It is clearly insufficient under the olden authorities, for most of them hold that an actual eviction by process of law only will constitute a breach of this covenant, and the remainder of such cases hold that, while it may not be necessary to show such actual eviction, yet that which is equivalent to such actual eviction must in all cases be alleged and proven.

See 3 Johns., 471; 5 Johns., 121; 13 Johns., 238; 2 Wend., 565; 7 Wend., 285; 4 Hill, 644; 2 Mass., 433; 5 Ohio, 154; 3 Bibb, 173

1 Martin & Yerger, 48; 2 Col., 44; 5 Cal., 265; 39 Cal., 360; 7 American Dec., 706; 14 American Dec., 45, and 1 Estee's Plea. and Prac., 500.

And it will be found upon examination that the most advanced of these cases have gone no further than to hold that a covenantee may yield to a paramount title hostilely asserted against the title conveyed to him by his grantor, and then avail himself of such a dispossession as a breach of the covenant in question, and may maintain an action thereon for such breach, though, of course, by thus yielding he places upon himself the burden of proving in such action that the title to which he has thus yielded is in fact a title paramount.

And in our opinion the great weight of authority, both ancient and modern, is to the effect that this covenant is never broken until there has been some hostile assertion of a better title. See Rawle on Covenants for Title, third edition, page 156, where this careful and learned author, after an exhaustive review of the cases, comes to the conclusion that the better considered modern cases establish the law as above stated.

Not only do the authorities establish the doctrine that this covenant is not broken by the naked fact that there is a better title outstanding, but we think that this is so upon reason also, for it may well happen that a person may in the best of faith convey a piece of land of which he has not a perfect title, being satisfied that he will be able to perfect his title so as fully to protect his grantee, and yet, under the rule contended for by the plaintiff in this cause, the covenant for quiet possession in his deed would be broken when made, and an action thereon would lie, even although the grantor should make perfect his title the next day after making the deed.

There are some modern cases that hold that if, at the time of the conveyance, the premises are in the actual adverse possession of a third person holding by superior title, that then this covenant is broken as soon as made; but if we concede this to be the law, still the complaint in this case would be fatally defective, as there is not even an attempt made to allege such an adverse possession, the allegation being, as before stated, simply that the grantor was not the owner, and all of the allegation in question might be entirely true, and yet the grantor have been in the quiet possession of the premises described in the deed at the time of the making thereof, and may have put his grantee in such possession, which he, the said grantee, may be now fully enjoying without any disturbance or threat of the same.

After a careful examination, we have been unable to find a single case that goes anything like far enough to sustain the allegation in question, and we think that upon reason and authority, the complaint failed to show any breach of the covenant set out therein. The demurrer was, therefore, rightly sustained by the district court and its action in so doing, and in giving judgment for the defendant thereon must be affirmed, and it is so ordered.

GREENE, C. J., and TURNER, A. J., concurred.

BIGELOW *v.* SCOTT.

Filed August 4, 1885.

MATTERS OF MERE EVIDENCE, ALLEGED IN A REPLY, may be stricken out on motion. PAROL EVIDENCE OF CONSIDERATION OF DUE BILL.—Parol evidence is admissible to show that the consideration for a due bill was the balance due to the payee, resulting from a transaction in real estate, founded upon a verbal agreement between the maker and the payee.

ERROR to the district court. The opinion states the facts.

C. E. Bowman and *Burke & Haller*, for the plaintiff in error.

G. Venable Smith, for the defendant in error.

WINGARD, A. J. This was an action brought by Arthur M. Scott v. I. N. Bigelow on a due bill, in words and figures as follows:

"SEATTLE, WASH. TER., July 3, 1883.

"Due Arthur M. Scott seven hundred and fifty dollars, payable thirty days after date. I. N. BIGELOW."

The complaint alleged that said due bill was given for value received, and admitted a credit or payment of five hundred dollars on the eighth day of August, 1883.

The defendant below denied each and every allegation of the complaint, except the making and delivery of the due bill and the payment of five hundred dollars, and set up as new matter of defense, a special contract between himself and Scott, alleging that at the time of making and delivering of the said due bill, and as the consideration thereof, plaintiff below orally promised and agreed that if defendant below would make and deliver said due bill, that said plaintiff would, within twenty days from its date, and before the said due bill would become due, purchase and procure for said defendant below a one-half interest in a certain lot in the city of Seattle, of the value of two hundred and fifty dollars and upwards, and that said promise of plaintiff below was the sole and only consideration for said due bill.

Defendant below further alleged a breach of this oral agreement, and that before the commencement of this suit he had elected to abandon and rescind the said oral agreement, and still elects to rescind and abandon the same.

The plaintiff below, for reply, denied each and every allegation set up in the answer as new matter.

This, we think, completed the issues, and the further allegations of the reply were only evidential, and might have been stricken out on motion: Sec. 95, code; Pomeroy's Remedies and Remedial Rights, sec. 625.

The plaintiff offered to prove on the trial that the due bill aforesaid was given for money received by defendant for plaintiff's use, arising out of the following transaction, viz.: Plaintiff and defendant had agreed by parol, that plaintiff should pay to defendant one-half the money paid by defendant for the purchase of certain lands. Said lands were purchased by defendant in his own name, plaintiff to own jointly with defendant one-half interest in said lands, and

was to receive from defendant one-half the proceeds of the sale of said lands. That on July 3, 1883, plaintiff and defendant had a settlement of the account of said real estate transaction; that thereupon defendant admitted and agreed that the sum of seven hundred and fifty dollars was plaintiff's portion of the proceeds of the sale of real estate mentioned, and that said due bill was given in consideration of said debt of seven hundred and fifty dollars due from defendant to plaintiff.

Defendant below objected to the introduction of this evidence because it was not competent evidence at law to prove the purchase by plaintiff of any interest in said lands, and because any such contract or interest can only be proved by deed, and because the same was at variance from the allegations and issues of plaintiff.

The court overruled the objection. Exception was asked and allowed, and this ruling of the court is assigned as error.

A motion was made to strike out the foregoing evidence. Also a motion for nonsuit; both of which having been denied by the court, the denials are assigned as errors.

A verdict was rendered for the plaintiff below, upon which judgment was entered.

We find no error in the record, and deem it unnecessary to say more than this, upon the foregoing statement of the case.

Let the judgment of the court below be affirmed.

HOYT, A. J., and TURNER, A. J., concurred.

YESLER v. DE KOSLOWSKI.

Filed August 4, 1885.

PROMISSORY NOTE—PAYMENT OF INTEREST AFTER MATURITY—STATUTE OF LIMITATIONS.—A payment of interest on a promissory note after maturity, and the indorsement of such payment thereon, prevents the statute of limitations from running prior to the time of such payment.

THE FINDINGS REVIEWED AND HELD SUSTAINED by the evidence.

Appeal from the district court. The opinion states the facts.

Struve, Haines & McMicken, for the appellant.

C. H. Hanford, for the appellee.

WINGARD, A. J. This was an action brought by the appellee against the appellant, upon a promissory note, given by appellant to John Leary for the sum of three hundred dollars, dated March 21, 1874, due on or before September 1, 1874, with interest payable monthly, in advance, at the rate of two per cent per month.

This note was assigned after maturity, to one Coleman, and by Coleman to Koslowski.

The appellee alleges that Yesler paid the interest on the note, which was then due, on September 21, 1875, which allegation *inter alia* the appellee denied.

Appellant also pleads the statute of limitations, which was denied by the reply.

The action was commenced July 5, 1881.

The cause was tried by the court, which found all the issues presented in favor of the appellee, and, thereupon, a decree was entered in favor of the appellee from which the appellant takes this appeal.

The fifth finding of the court below is as follows:

"That, on the twentieth day of September, 1875, said defendant, Henry L. Yesler paid to said James L. Coleman, as interest on said note, the sum of sixty-six dollars, and said Coleman upon the same day endorsed said payment on said note."

This finding, which we think is sustained by the evidence, takes the claim of the appellee based upon the note, out of the statute of limitations: Code of Wash., secs. 44, 45; 3 Parsons on Contracts, 7 ed., 73–77.

The seventh finding which we also agree is sustained by the evidence, is as follows:

"That no payments have been made upon said note since said twentieth day of September, 1875, and the whole of the principal of said note, and the interest thereon, since said twentieth day of September, 1875, remains unpaid."

The thirteenth finding of the district court is as follows:

"That there is no counter claim or set off against said promissory note."

This last finding was, doubtless, based upon the evidence disclosed by the account itself, pleaded by the appellant as a counter claim, that said account was barred by the statute of limitations.

It follows from these findings, supported by the evidence as we deem them to be, that the court below correctly rendered the decree of which the appellant complains.

The judgment of the district court is affirmed.

HOYT, A. J., and TURNER, A. J., concurred.

SUPREME COURT OF CALIFORNIA.

No. 9,265.

COTHRIN *v.* FABER ET AL.

In Bank. Filed November 23, 1885.

PRE-EMPTION OF PUBLIC LAND—PRIORITY OF LOCATION—RELATION OF TITLE.—Judgment affirmed for the reasons stated in the opinion in department, reported in 4 West Coast Rep., 295.

APPEAL from a judgment of the superior court of El Dorado county, rendered in favor of the defendant. The facts appear in the opinion in department, reported in 4 West Coast Rep., 295.

Charles F. Irwin, for the appellant.

A. P. Catlin, for the respondents.

MYRICK, J. This case was heard in department one of this court, and an opinion filed October 28, 1884, affirming the judgment of the court below: 4 West Coast Rep., 295. Hearing in bank was granted, and has been had. For the reasons given in the opinion in department, the judgment is affirmed.

ROSS, J., MORRISON, C. J., MCKEE, J., and THORNTON, J., concurred.

No. 9,163.

EDWARDS *v.* CREPIN ET AL.

Department Two. Filed November 23, 1885.

CONTRACT OF EMPLOYMENT—AGREEMENT FOR COMPENSATION IN CASE OF DISCHARGE—PUBLIC POLICY.—A provision in a contract of employment, whereby the employers promise to pay the employee, for his time and energies, while employed, even if they should discharge him from their service for derelictions of duty, or inability to carry out their wishes and plans, is not void, because being against public policy.

APPEAL from a judgment of the superior court of the city and county of San Francisco, entered in favor of the plaintiff.

R. A. Redman, for the appellants

Neumann & Eickhoff, for the respondent.

FOOTE, C. The plaintiff sued the defendants for services rendered by his assignor, one Taubles, under the provisions of a certain written contract.

In the first instance judgment passed for the plaintiff in the sum of six hundred dollars, which, upon the court's suggestion he agreed to allow to be reduced to the sum of two hundred and twenty-five dollars and sixty-five cents with legal interest and costs to the amount of fifty-one dollars and seventy-five cents, and from that the defendants appealed.

The cause comes here on the judgment roll alone.

The defendants make the points:

First—That the clause of the contract under which judgment was obtained is void, being contrary to public policy.

Second—That the judgment was for less than three hundred dollars, and, therefore, did not carry costs, under section 1,025, code of civil procedure.

The respondent confesses error as to the last, so that the first question alone remains for decision.

Although the findings are not so clear as they might have been, we think that the trial court therein determined that the plaintiff's assignor rendered services to the defendants for the space of one month or thereabouts, under the conditions of the written contract, and that *then* the defendants discharged him from their employment for *misconduct* and *incapacity*.

As we read the contract referred to, we do not understand from it, that the *misconduct* and *incapacity* of Taubles was agreed to be paid for at the rate of two hundred dollars per month. The fair construction to be given that instrument is, that the parties were entering upon a new and untried scheme, an experiment in the sale of a patent "Elixir" for the curing of skin diseases, etc.

That it was desirable to have an agent to secure the sale of the "Elixir;" that, as the venture might or might not be successful, this agent desired to, and did by a certain clause in the contract, secure to himself pay, at the rate of two hundred dollars per month, while engaged in this employment, intending and actually providing that he should receive the money even if the defendants discharged him for misconduct or incapacity. The parties seem to have contemplated that perhaps they might not, upon more intimate association, desire to continue the contract in force, and it was natural, and we cannot see how it was improper, that Taubles should not desire to enter upon the duties appointed to him, unless he could be certain of reasonable compensation for the time and talents, such as the last might be, that he would devote to the enterprise.

The defendants consented to this arrangement, provided they could reserve, which they did, the right to themselves to discharge Taubles, whenever they desired, for *misconduct* or *incapacity*.

We do not understand this contract to have placed a premium upon *misconduct* or *incapacity*, but to have simply secured to the plaintiff's assignor, compensation for his time and energies, while employed by the defendants, even if they should discharge him from their service for dereliction of duty, or inability to carry out their wishes and plans.

We are, therefore, of opinion, that so much of the judgment that imposes costs and disbursements in the court below, upon the defendants, should be stricken out, and that in all other respects the judgment should be affirmed.

BELCHER, C. C., and SEARLS, C., concurred.

BY THE COURT. For the reasons given in the foregoing opinion, so much of the judgment as imposes costs and disbursements in the court below upon defendants is ordered stricken out, and in all other respects the judgment is affirmed.

No. 9,979.

LEWIS, EXECUTRIX, ETC. v. ADAMS.

In Bank. Filed November 23, 1885.

FOREIGN EXECUTRIX CANNOT MAINTAIN ACTION IN THIS STATE.—Under section 1,913 of the code of civil procedure, a foreign executrix cannot maintain an action in the courts of this state, either as such executrix, or in her individual name, to recover a debt due her testator, without having first obtained ancillary letters testamentary or of administration.

THE SAME—AUTHORITY OF FOREIGN EXECUTOR OR ADMINISTRATOR OVER LOCAL ASSETS.—Under the provisions of the code of civil procedure regulating the settlement of the estates of decedents, the local administration of the estate of a deceased non-resident may be treated as ancillary, and after the payment of the local debts and expenses, the surplus may, by order of the court, be delivered to the executor or administrator of the domicile; and to that end, the executor or administrator of the domicile may apply to the court, in this state, for such order; but, beyond that, no authority over the local assets is given to the executor or administrator of the domicile.

APPEAL from an order of the superior court of Los Angeles county, granting the defendants a new trial. The opinion states the facts. The opinion in department is reported in 7 West Coast Rep., 353.

Victor Montgomery and *Smith, Brown & Hutton*, for the appellant.

Thorn & Stevens, for the respondents.

MYRICK, J. Action on a judgment. The complaint averred that on the fifteenth of March, 1877, in a district court in the state of Texas, in an action pending between the plaintiff, as executrix, and the defendants, it was adjudged that the defendants pay to plaintiff, as executrix, a sum named, and on that day judgment was accordingly duly rendered; the plaintiff's testator died in 1872, the will admitted to probate, and in the same year letters testamentary were issued to plaintiff, and plaintiff duly qualified; wherefore, the plaintiff, as executrix, prayed judgment against defendant for the amount of the judgment, interest and costs.

The complaint was filed March 17, 1882.

The complaint was demurred to by defendant Adams, on the grounds: 1. The plaintiff had no legal capacity to sue, being executrix only by appointment in Texas, and having no authority beyond the jurisdiction of that state; 2. The cause of action is barred by section 336, code of civil procedure; and, 3. The facts stated are not sufficient to constitute a cause of action. The demurrer was overruled, and the cause was tried on the issues raised by the answer. The court found that "all the allegations of plaintiff's complaint are true and correct," and rendered judgment against Adams for the amount prayed for.

Subsequently, on motion of defendant Adams, a new trial was granted, but upon what ground was not stated. It is, therefore, to be seen if the order can be sustained on any ground.

When this case was decided by this court in department, the court used the following language:

"1. The plaintiff, as a foreign executrix, could not maintain an action in the courts of this state without first obtaining ancillary letters of administration or testamentary. Section 1,913, code of

there was a fraudulent conspiracy to cheat and defraud the plaintiff which culminated in the acceptance by him of a lease from McGrew, who had no title or color of title to the land in question, and the promises of plaintiff to pay him rent therefor. To this complaint defendants demurred and the court sustained the demurrer. Final judgment was entered up thereupon, and plaintiff takes this appeal.

We can hardly understand upon what ground the court below acted in sustaining the demurrer to the complaint. It is plainly charged, with particularity of detail, that the defendants formed a conspiracy to cheat and defraud the plaintiff, that they carried out such conspiracy by false and fraudulent representations which imposed upon the plaintiff, and that plaintiff has been damaged thereby. He now asks that the lease so fraudulently obtained from him may be brought into court and declared null and void, and further that he may have damages for the fraud practiced upon him. In our judgment the complaint sets forth a good cause of action against the defendants and one which entitles him to relief in a court of equity.

It is claimed on the part of the defendants that this case comes within the rule laid down in Hawkins v. Hawkins, 50 Cal., 558. In our opinion the rule laid down in that case does not apply to this as here the circumstances are different.

In the complaint some matter occurs which the learned judge below regarded as disrespectful to himself, and, therefore, struck the same out. The objectionable matter was a part of the plaintiff's case, and was not disrespectful. It should, therefore, have been allowed to remain in the complaint.

Judgment and order reversed.

MYRICK, J., and THORNTON, J., concurred.

No. 20,095.

PEOPLE *v.* JONES.

Department Two. Filed November 24, 1885.

VERDICT OF CONVICTION NOT DISTURBED WHEN EVIDENCE IS CONFLICTING.—A verdict convicting the defendant will not be disturbed, because contrary to the evidence, when the preponderance of the evidence went to prove the defendant's guilt.

NEW TRIAL—NEWLY DISCOVERED EVIDENCE.—A new trial will not be granted, on the ground of newly discovered evidence, if it was within the power of the moving party to have procured such evidence on the trial.

APPEAL from a judgment of the superior court of the city and county of San Francisco, entered upon a verdict convicting the defendant, and from an order denying him a new trial. The opinion states the facts.

John D. Whaley, for the appellant.

E. C. Marshall, attorney general, for the respondent.

No. 9,126.

DAVIS v. MCGREW ET AL.

Department Two. Filed November 23, 1885.

CONSPIRACY TO OBTAIN LEASE—PLEADING—CANCELLATION.—The complaint charged with particularity of detail, that the defendants formed a conspiracy to cheat and defraud the plaintiff, by inducing him to accept a lease of certain land from one of them, that they carried out such conspiracy by false and fraudulent representations, which imposed upon the plaintiff, and that plaintiff has been damaged thereby. *Held*, upon a review of the averments of the complaint, that a good cause of action was stated, entitling him to a cancellation of the lease.

APPEAL from a judgment of the superior court of Contra Costa county, entered in favor of the defendants. The opinion states the facts.

A. H. Griffiths, for the appellant.

A. A. Moore, *George W. Reed* and *E. J. Emmons*, for the respondents.

MORRISON, C. J. The foundation of this action is an alleged conspiracy between the defendants to cheat and defraud the plaintiff. In support of his action he states numerous facts and circumstances tending to establish such conspiracy, and a final consummation thereof by the defendants.

The plaintiff avers he was in possession exclusively of a tract of land forming part of the San Pablo rancho; that he was cultivating the same and raising a crop thereon, of the value of one thousand dollars.

That a conspiracy was formed by the defendants to obtain from him, the plaintiff, the tract of land so held and cultivated by him, and by reason of artful devices and deceitful practices on the part of the defendants acting in concert, and which are set forth in the complaint, the plaintiff was prevailed upon and induced to accept a lease of the land so held and cultivated by him, from the defendant McGrew. That he did attorn to said McGrew and in the lease agreed to pay McGrew a certain rental for said land. That McGrew had no title to the land, but made it appear to the plaintiff that by accepting a lease therefor, he would be secured in his rights and avoid further trouble and perhaps ultimate loss.

The defendant Gift acted as the pretended friend of the plaintiff and in the disguise of a pacific mediator between the parties, making various statements respecting the rights and prospects of the other defendant in the case, and fraudulently deceiving the plaintiff and inducing him to believe his interests would be subserved by the acceptance of a lease from and by attorning to the defendant McGrew. That plaintiff is an ignorant foreigner, and relying upon such representations, and fully believing that the defendant Gift was acting as his friend in the matter, and that it was to his, plaintiff's, interest to accede to the terms proposed, he did accept a lease from and attorn to the defendant McGrew.

The complainant goes into much detail in stating the alleged fraudulent acts of the parties defendant, from which it appears that

there was a fraudulent conspiracy to cheat and defraud the plaintiff which culminated in the acceptance by him of a lease from McGrew, who had no title or color of title to the land in question, and the promises of plaintiff to pay him rent therefor. To this complaint defendants demurred and the court sustained the demurrer. Final judgment was entered up thereupon, and plaintiff takes this appeal.

We can hardly understand upon what ground the court below acted in sustaining the demurrer to the complaint. It is plainly charged, with particularity of detail, that the defendants formed a conspiracy to cheat and defraud the plaintiff, that they carried out such conspiracy by false and fraudulent representations which imposed upon the plaintiff, and that plaintiff has been damaged thereby. He now asks that the lease so fraudulently obtained from him may be brought into court and declared null and void, and further that he may have damages for the fraud practiced upon him. In our judgment the complaint sets forth a good cause of action against the defendants and one which entitles him to relief in a court of equity.

It is claimed on the part of the defendants that this case comes within the rule laid down in Hawkins v. Hawkins, 50 Cal., 558. In our opinion the rule laid down in that case does not apply to this as here the circumstances are different.

In the complaint some matter occurs which the learned judge below regarded as disrespectful to himself, and, therefore, struck the same out. The objectionable matter was a part of the plaintiff's case, and was not disrespectful. It should, therefore, have been allowed to remain in the complaint.

Judgment and order reversed.

MYRICK, J., and THORNTON, J., concurred.

No. 20,095.

PEOPLE *v.* JONES.

Department Two. Filed November 24, 1885.

VERDICT OF CONVICTION NOT DISTURBED WHEN EVIDENCE IS CONFLICTING.—A verdict convicting the defendant will not be disturbed, because contrary to the evidence, when the preponderance of the evidence went to prove the defendant's guilt.

NEW TRIAL—NEWLY DISCOVERED EVIDENCE.—A new trial will not be granted, on the ground of newly discovered evidence, if it was within the power of the moving party to have procured such evidence on the trial.

APPEAL from a judgment of the superior court of the city and county of San Francisco, entered upon a verdict convicting the defendant, and from an order denying him a new trial. The opinion states the facts.

John D. Whaley, for the appellant.

E. C. Marshall, attorney general, for the respondent.

FOOTE, C. The defendant was convicted of the crime of embezzlement, upon information, under section 508, penal code. A motion for a new trial was made in his behalf and denied. From the order made therein and the judgment of conviction he appealed.

The grounds of this appeal are that the verdict of the jury was contrary to the evidence, and that the court should have granted a new trial for that reason, and that of newly discovered evidence.

The preponderance of the evidence certainly went to prove the guilt of the defendant as charged, and the verdict against him should not be disturbed: People v. Ah Loy, 10 Cal., 302; People v. Gill, 45 Cal., 285; People v. Simpson, 50 Cal., 304.

It appears that it was within the defendant's power to have introduced on his trial the most of that which he terms newly discovered evidence. And the material parts of it are flatly contradicted by a counter affidavit of Mr. Fenner.

There is no error in the record and the judgment and order should be affirmed.

BELCHER, C. C., and SEARLS, C., concurred.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

No. 8,489.

LEE DOON ET AL. v. TESH ET AL.

In Bank. Filed November 24, 1885.

ACTION TO DETERMINE RIGHT OF POSSESSION TO MINING CLAIM—CITIZENSHIP MUST BE AVERRED.—In an action, brought under section 2,326 of the United States revised statutes, to determine the question of the right of possession to a mining claim, preliminary to the right to purchase from the United States, the complaint must show that the plaintiffs possess those qualifications without which they would not be entitled to purchase. Consequently, the complaint must allege that the plaintiffs are citizens of the United States, or have declared their intention to become such.

ALIENS CAN ACQUIRE NO RIGHTS AS LOCATORS OF MINING CLAIM.—Neither prior nor subsequent to the act of July 26, 1866, could parties who were not citizens of the United States, or who had not declared their intention to become such, acquire any vested right to the possession of a mining claim on the public lands. Consequently, such parties had no rights to be preserved by the act of May 10, 1872.

APPEAL from a judgment of the superior court of Siskiyou county, entered in favor of the defendant. The opinion states the facts. The opinion in department is reported in 5 West Coast Rep., 596.

H. B. Gillis and *H. B. Warren*, for the appellants.

Calvin Edgerton, for the respondents.

SEARLS, C. After an examination of the record in this cause, and of the former decision rendered therein by department two, 5 West Coast Rep., 596, we are of opinion the judgment rendered is founded upon a correct exposition of the law applicable thereto.

Defendants had applied through the United States land office for a patent to the Clark & Co. placer mine. Plaintiffs, who claim to own the Greenhorn hydraulic placer mine, filed a protest and adverse claim in the land office, claiming twenty-four and thirty one-hundredths acres, parcel of the land applied to be patented, and thereupon the register and receiver stayed proceedings in the land office, and thereafter suit was brought as provided by section 2,326, revised statutes of the United States, to determine the question of the right of possession to said disputed mining ground.

This action was brought pursuant to such order—and the complaint avers that William McConnell, one of the plaintiffs, is a citizen of the United States, a resident of the county, etc., but is silent as to the citizenship and residence of the other plaintiffs.

The action is not brought to recover possession of the property or damages for a trespass thereon, or to quiet title thereto, but is a special action to determine the right of possession preliminary to the right to purchase from the United States.

Lands valuable for minerals are reserved from sale, except as otherwise expressly directed by law: Revised statutes, U. S., sec. 2,318.

All valuable mineral deposits in lands belonging to the United States, are free and open to exploration and purchase by citizens of the United States, and those who have declared their intention to become such: Sec. 2,319, rev. statutes, U. S.

A patent for any land claimed and located for valuable deposits may be obtained by any association, person or corporation, *authorized to locate a claim* under the chapter on mineral lands and mining resources: U. S. revised statutes, sec. 2,325.

1. The right to possession of a mining claim, comes through a location, and such location can only be made by a citizen, or one who has declared his intention to become such.

2. An applicant for a patent must have the right to possession and, as we have seen, must be a qualified locator.

3. Upon the determination of the right to possession as provided for by section 2,326 of the revised statutes of the United States, the prevailing party, upon filing a copy of the judgment roll with the register of the land office, together with the certificate of the surveyor general, showing that the requisite amount of labor has been performed or improvements made, with a description of the premises, and upon paying the proper fees and purchase price of the land, may have a patent to the land, or such portion thereof as he has shown himself to "rightly possess."

It would seem to follow that as the right to possession and the right to a patent are made to depend upon citizenship, the complaint which forms the basis upon which these rights are supported, should show the plaintiffs to possess those qualifications without which, the judgment they seek, and the consequences to flow from that judgment, cannot be reached.

Where a right is conferred upon a particular class of persons or by reason of possessing some special qualification or status, he who claims such right must show himself to belong to the class designated or to possess the qualification prescribed or the status mentioned as the basis of the right.

The contention of counsel for appellants is, that the complaint shows that the plaintiffs and their predecessors in interest have for twenty-five years and upward, been the owners, subject only to the paramount title of the United States, and have occupied and worked the mining ground in question, etc.; that their right to the mining ground was acquired prior to the act of congress of May 10, 1872. That the statute is not retrospective, and that by section 2,344 of that act, their rights are preserved.

Section 2,344 provides that "nothing contained in this chapter shall be construed to impair in any way rights or interests in mining property acquired under existing laws."

The question then arises, had the plaintiffs, prior to May 10, 1872, acquired any rights under the then existing laws, to be protected by section 2,344 of the revised statutes.

Upon the discovery of gold in California, and the influx of immigrants following that discovery, it became the duty of the courts organized, to meet the novel circumstances surrounding them, and to administer justice in view of all the facts presented. The paramount title to the mineral lands was in the government of the United States. That government by the act of congress of 1850, 9 U. S. statutes, 452, admitting California into the Union, expressly provided, that the people of that state, through their legislature or otherwise, should never interfere with the primary disposal of the public lands within its limits, and should pass no law and do no act whereby the title of the United States to, and right to dispose of said lands should be questioned or impaired. Beyond this action, the general government for several years remained practically a passive spectator of the settlement upon, and development of its mineral lands in California. The right of the United States to the lands in question, was never seriously questioned, nor was its authority to dispose of such lands at such time and in such manner and to such persons, as it should by law provide, doubted.

The legislature of California and its courts, each in its appropriate way, took action in reference to the possessory rights acquired by settlers and locators upon the public domain. As to the public mineral lands of the state, the courts held them open to appropriation and occupancy for mining purposes, and in a multitude of cases adjudicated upon conflicting rights thereto, and growing out of the assertion by individuals of such rights, until a system of jurisprudence governing and controlling in questions relating to mines and mining rights was formulated, and occupies a prominent place in the legal annals of the state. It was founded to a great extent in the necessities of the case. The general government was the true owner, but not asserting its title, the theory was maintained

that possession under the rules and customs, established and in force, gave as to mining property, a right, which, except as against the government, would be upheld as though the title was vested in the possessor.

Nothing can be found, however, in the legislation or decisions of our courts which militates against the ultimate right of the general government to deal with its lands within our jurisdiction as a proprietor thereof may do.

Up to 1866, the United States had not authorized or, except by its silence, in any way assented to the occupancy of any of its mineral lands in California, and, instead of having an equitable title thereto, the plaintiffs, in common with all other claimants in possession of mining claims upon public lands, were, as against the government of the United States, subject to be treated as trespassers, and to be punished by fine and imprisonment: 2 U. S. statutes, 445.

The courts of the United States have steadily held that no license to mine for the precious metals upon the public lands could be implied, by reason of the indulgence, or tacit encouragement, of the government, extended to the mining population: U. S. v. Parrott, 1 McAll., C. C. R., 271; U. S. v. Castillero, 2 Black, U. S., 17.

If we are correct in these deductions, plaintiffs could not have, and prior to 1866 did not have, as against the government of the United States, or those holding under it, any vested right or equitable title in or to any mining claim in California.

The passage of the act of July 26, 1866, 14 U. S. statutes, 251, "marked a change in the governmental policy and introduced a new era in the history of mining enterprise:" Weeks on Mineral Lands, p. 2.

By the first section of that act, it was provided:

"That the mineral lands of the public domain, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and occupation by all citizens of the United States and those who have declared their intention to become citizens, subject to such regulations as may be prescribed by law, and subject, also, to the local customs or rules of miners in the several mining districts, so far as the same may not be in conflict with the laws of the United States."

Thus, for the first time in the history of the country, its public domain was open to exploration for mines and mineral, and to the occupation of such mines as might exist and be discovered therein.

The first section of the act was general in its application, and applied equally to veins or lodes of quartz or other rock in place, bearing gold, silver, cinnabar or copper, and to placer or gravel mines.

The license to explore, enter, occupy and mine was general, but the subsequent sections of the same act, providing for securing title from the government by claimants, applied only to veins or lodes of quartz or other rock in place.

So, too, the right or license to explore and occupy for mining purposes, was limited to citizens of the United States and to those who had declared their intention to become such.

It follows that, if plaintiffs were not citizens, and had not declared their intention to become such, they did not acquire any vested right to possession under the act of 1866, and, as a consequence, had no rights to be preserved by the act of 1872: Section 2,344 of revised statutes, U. S.

The act of congress of May 10, 1872, repealed the first section of the act of 1866, but retained the same provision in reference to the necessity of citizenship of locators as that contained in the repealed section.

It goes further than the act of 1866, by providing that any person, association or corporation authorized to locate a claim under that act, who had complied with the terms of the act, might obtain a patent for land claimed and located for valuable deposits.

Placer claimants might procure patents to their claims, but like locators they must be citizens or must have declared their intention to become such.

The right is given, not to all persons indiscriminately, but to a particular class of individuals, and the pleadings in these special cases should show that the persons who seek to avail themselves of the special privileges conferred by the act of congress, are within the class thus privileged.

There is nothing in this view of the case in conflict with Ferguson v. Neville, 61 Cal., 356. In that case the mining claim had been regularly located by American citizens of lawful age, who conveyed to Chinamen, who, after holding for about one year, conveyed to Ferguson, who was a citizen and competent to locate and purchase mining claims. This court held that by the original location a qualified title vested in the locators; that under article 1 of section 17 of the constitution, in force at that time, foreigners, who were *bona fide* residents of the state, could purchase and hold property; and having conveyed to Ferguson before the location was made under which Neville claimed, the conclusion was reached that plaintiffs had a good title.

Had the location in that instance been made by the foreigners, the case would have been parallel with this, and it would probably have been held that no right to the claims was acquired by such an attempted location.

We must not be understood as holding that in all actions in relation to mining claims, it is necessary for plaintiffs to aver citizenship.

We are discussing the requirements of a complaint in the special case provided by the act of congress to determine the right of possession of a mining claim, under the laws of congress, in which the successful party becomes entitled on the judgment roll to apply for a patent; a case in which the parties must connect themselves with the title of the government and show compliance with the acts of congress, and our conclusions are limited to such action.

We are of opinion, as stated at the outset, that the former judgment herein should stand as the judgment of the court.

FOOTE, C., and BELCHER, C. C., concurred.

BY THE COURT. For the reasons given in the foregoing opinion the judgment as to plaintiff McConnell is reversed, with directions to the court below to overrule the demurrer to his complaint, with leave to the defendants to answer within ten days after being notified thereof. In other respects the judgment is affirmed.

No. 8,563.

GERMAN SAVINGS AND LOAN SOCIETY *v.* HUTCHINSON, EXECUTRIX, ETC., ET AL.

In Bank. Filed November 24, 1885.

MORTGAGE—AGREEMENT FOR RENEWAL OF.—After the maturity of a note and mortgage, the mortgagor executed to the mortgagee an instrument, in which, after reciting the loan and the execution of the note and mortgage, and the place of record of the latter, and that he was desirous of extending the loan, it was agreed "that the time for the payment of the said promissory note shall be extended to, and the said note shall not mature or be payable until the thirtieth day of December, 1874, provided that this agreement shall not affect or impair any other covenant or condition in the said promissory note or mortgage contained, but that they shall remain in as full force and effect as if this agreement had not been made." *Held*, that this agreement was a renewal of the note and mortgage, within section 2,922, civil code.

ESTATE OF DECEDENT—PRESENTATION OF CLAIM—STATUTE OF LIMITATIONS.—Under section 1,569 of the code of civil procedure, the statute of limitations does not run against a claim, founded on a note and mortgage, after the same has been presented to and allowed by the executor of the deceased mortgagor.

THE SAME—PAYMENTS FOR TAXES AND ASSESSMENTS—ATTORNEY'S FEES.—Payments made for taxes and street assessments, under authority given in the mortgage, after the presentation of the claim, are properly allowable on foreclosure without presentation. And the same is true of an attorney's fee provided for in the mortgage.

APPEAL from a judgment of the superior court of the city and county of San Francisco, entered in favor of the plaintiff and from an order denying the defendants a new trial. The opinion states the facts.

W. H. Allen, for the appellants.

Jarboe & Harrison, for the respondent.

MYRICK, J. The questions involved in this appeal relate to an alleged renewal of a note, and thereby of a mortgage, regarding the bar of the statute of limitations.

December 30, 1872, the testator executed to the plaintiff his promissory note for one thousand five hundred dollars and interest, payable in one year.

The payment of the note was secured by mortgage of even date. On the fifth of January, 1874, after the maturity of the note, the testator executed to the plaintiff an instrument in which, after reciting the loan of one thousand five hundred dollars and the execution of the note and mortgage, and the place of record of the latter, and that he was desirous of extending the loan, it was agreed "that

the time for the payment of the said promissory note shall be extended to, and the said note shall not mature or be payable until the thirtieth day of December, 1874, provided that this agreement shall not affect or impair any other covenant or condition in the said promissory note or mortgage contained, but that they shall remain in as full force and effect as if this agreement had not been made."

We are of opinion that this agreement was a renewal of the note and mortgage, within section 2,922, civil code. The maker of the note died September 21, 1875, and the claim upon the note was presented to the executrix of his estate May 7, 1876, and allowed and approved. No issue was tendered in the answer as to the presentation, allowance or approval of the claim. This action to foreclose the mortgage was commenced July 30, 1879.

1. We are of opinion the action was not barred by the statute of limitations. "No claim against any estate, which has been presented and allowed, is affected by the statute of limitations pending the proceedings for the settlement of the estate:" Sec. 1,569, C. C. P.

2. The payments of taxes and street assessments were made under authority given in the mortgage, and when such payments are made after the presentation of the claim, they are properly allowable on foreclosure without presentation.

3. The attorney's fee on foreclosure was provided for in the mortgage, and was properly allowed.

No error appears. The judgment and order are affirmed.

ROSS, J., MCKINSTRY, J., THORNTON, J., MCKEE, J., and MORRISON, C. J., concurred.

No. 11,102.

SMITH v. DUNN, CONTROLLER, ETC.

In Bank. Filed November 24, 1883.

COUNTY GOVERNMENT ACT—FEES AND COMMISSIONS—PAYMENT INTO COUNTY TREASURER.—The word "fees," in its popular and common acceptation, includes the commissions, estimated by a percentage allowed by law on sums of money received or collected. The word is used with such signification in section 165 of the county government act of March 14, 1883. Such percentages should be paid, under section 168 of such act, into the respective county treasuries, and be set apart as a separate fund, known as the salary fund, to be applied to the payment of the official salaries.

APPEAL from a judgment of the superior court of Yolo county, entered in favor of the plaintiff. The opinion states the facts.

E. C. Marshall, attorney general, for the appellant.

Frank S. Sprague, for the respondent.

THORNTON, J. This action was brought by plaintiff as treasurer of Yolo county to procure a writ of mandate to compel the defendant, as state controller, to make a settlement with the petitioner, allowing certain commissions claimed to be due to the county above mentioned, and certain mileage due respondent. This claim is made under the act of May 17, 1861: See stats. of 1861, p. 453, secs. 107,

108; the act of March 5, 1870, stats. 1869–70, p. 164, sec. 13; and sec. 3,428 of the political code.

It is said that the law making these allowances has been repealed by the act approved March 14, 1883, entitled "An act to establish a uniform system of county and township governments." We are referred to sections 164 and 165 of this act.

By section 164 it is enacted that "the salaries and fees provided for in this act shall be in full compensation for all services of every kind and description rendered by the officers therein named, their deputies and assistants."

The same section excepts from the foregoing certain commissions allowed the assessor, estimated by a percentage of the amount of the taxes on personal property collected by him under section 3,820, political code, and on the poll taxes also collected by him. In many of the counties the constables are to be compensated by fees allowed by law at the date of the passage of the act or afterwards. These fees are, in part, commissions estimated by a percentage.

It is provided by section 165 of this act, as follows:

"All salaried officers of the several counties of this state shall charge and collect for the use of their respective counties, and pay into the county treasury on the first Monday in each month, the fees now or hereafter allowed by law in all cases, except the percentage heretofore allowed such officers, and excepting also such fees as are a charge against the county."

Now it is argued, that inasmuch as "percentages" are not required in so many words to be paid into the county treasury, but "fees" are, that percentages and fees refer to different things, and that the officers have no right to retain and pay such percentages into the treasury.

We cannot concur in this view. The word "fees," in its popular and common acceptation, includes the commissions, estimated by a percentage allowed by law on sums of money received or collected. We think the word fees is used with such signification in the section cited from the county government act.

This view is sustained by section 168 of the same act, which provides that "for the purpose of paying the salaries provided for in this act, all fees directed to be paid into the county treasury shall be set apart therein as a separate fund, to be known as the salary fund, to be applied to the payment of said salaries."

The act provides for compensation to most of the officers named in it by fixed salaries, and by way of providing the means of paying these salaries orders that the fees heretofore devoted to the compensation of such officers be paid into the respective county treasuries and constitute a fund for that purpose. The principal portion of the fees heretofore applied to the payment of salaries was the percentages, usually styled commissions. If these percentages were not included in the word *fees*, the salary fund might be trifling in amount.

It should be borne in mind that the state's portion of the taxes is collected by county officers. It is but just, therefore, that the commissions on this portion should be paid into the county treasuries and go into the salary fund. If it were otherwise, the entire expense of collecting the state's portion of the revenue would fall on the counties. Under the system as we construe it, the state and county each will pay the expense of collecting its own revenue.

The judgment of the court below is without error and must be affirmed.

MYRICK, J., MORRISON, C. J., ROSS, J., MCKINSTRY, J., and MCKEE, concurred.

No. 8,480.

BOWMAN v. DEWEY.

In Bank. Filed November 25, 1885.

SUPPLEMENTAL TAX ROLL—ASSESSMENT VOID, IF NO OPPORTUNITY BE GIVEN TO CONTEST.—A supplemental assessment of personal property, made by the assessor of the city and county of San Francisco, under section 9 of the act of March 18, 1874, is void, and a tax founded thereon creates no lien.

APPEAL from a judgment of the superior court of the city and county of San Francisco, entered in favor of the defendant. The opinion states the facts.

Cope & Boyd, for the appellant.

Doyle, Barber, Galpin & Scripture, for the respondent.

BELCHER, C. C. This is an action to enforce the specific performance of a contract for the sale of a lot in the city of San Francisco, and to require the defendant to pay certain taxes which, it is alleged, are a lien on the lot.

The contract provided that the title to the lot should be "good and marketable, and free of all incumbrances." The complaint alleges that, in the fiscal year 1880–81, the assessor of the city and county of San Francisco made a special and supplemental assessment of certain personal property owned by the defendant, under the provisions of the act of March 18, 1874: Stats. 1873-74, p. 477; and that the taxes so levied have not been paid, and are a lien and incumbrance on the lot.

The defendant demurred to the complaint, and at the same time answered thereto. By his answer, he denied that the said taxes ever became or were a lien on the lot, and he alleged, among other things, that the said special or supplemental assessment was invalid, because it was made after the fourth Monday of July, 1880, and after the board of equalization had adjourned, and without any order or direction of the board of supervisors or the board of equalization.

The plaintiff demurred to the answer, on the ground that it did not state facts sufficient to constitute a defense or counter-claim to the cause of action set forth in the complaint.

The court sustained the demurrer to the complaint, and overruled the demurrer to the answer; and, the plaintiff declining to amend, judgment was entered in favor of the defendant.

The appeal is from that judgment.

It is apparent that the only question presented for decision is: Was the tax founded on the assessment in question, a lien upon the lot of land described in the complaint? A similar assessment was involved in the case of People v. Pittsburg Railroad Company, and was held by this court to be invalid: 8 West Coast Rep., 27.

Upon the authority of that case, the judgment here should be affirmed.

SEARLS, C., and FOOTE, C., concurred.

BY THE COURT. For the reasons stated in the foregoing opinion the judgment is affirmed.

MYRICK, J., and THORNTON, J., dissented.

No. 8,203.

MCGEE *v.* CITY OF SAN JOSE.

In Bank. Filed November 25, 1885.

DEBTOR AND CREDITOR—PAYMENTS FOR BENEFIT OF CREDITOR.—One person cannot, without authority, pay the debt of another, and charge the amount so paid against the party for whose benefit the payment was made.

CONTRACT WITH MUNICIPALITY—TERMS OF CANNOT BE CHANGED BY LEGISLATION.—A contract entered into with a municipality, which provides for a certain mode of payment by the city, cannot be changed by subsequent legislation, so as to authorize a performance different from that prescribed in the contract. And payments made, in conformity with such subsequent legislation, will not bind the contractor unless assented to by him.

APPEAL from a judgment of the superior court of Santa Clara county, entered in favor of the defendant, and from an order denying the plaintiff a new trial. The opinion states the facts. The opinion in department is reported in 6 West Coast Rep., 630.

Houghton & Reynolds, for the appellant.

D. W. Herrington, for the respondent.

MORRISON, C. J. This is an action on a contract for street work done in the city of San Jose under a contract between the plaintiff and the authorized agent of the city. The contract price for the work was the sum of three thousand four hundred dollars, "whereof seventy per cent should be paid in gold and thirty per cent in silver coin, in the manner prescribed by law, and in accordance with an act of the legislature of the state of California entitled 'An act to incorporate the city of San Jose,' approved March 17, 1874, by a warrant drawn upon the general fund in the treasury of said city by the mayor and common counsel thereof at the next general meeting of said mayor and common counsel, after the acceptance of said work, to be paid by the treasurer of said city out of said general fund in the proportions of gold and silver coin expressed in said

agreement." The contract was entered into on the tenth day of December, 1877. The case was tried by the court without a jury, and the following findings were made and filed by the judge:

"First—That on the tenth day of December, 1877, the contract, exhibit A, attached to the complaint in this action, was entered into between said plaintiff and the defendant through and by the then acting street commissioner of said city.

"Second—That said plaintiff performed the work in said contract provided for and completed the same on or about the — day of July, 1878.

"Third—That said work and improvement was accepted by the proper authorities after its completion, and on or about the — day of July, 1878.

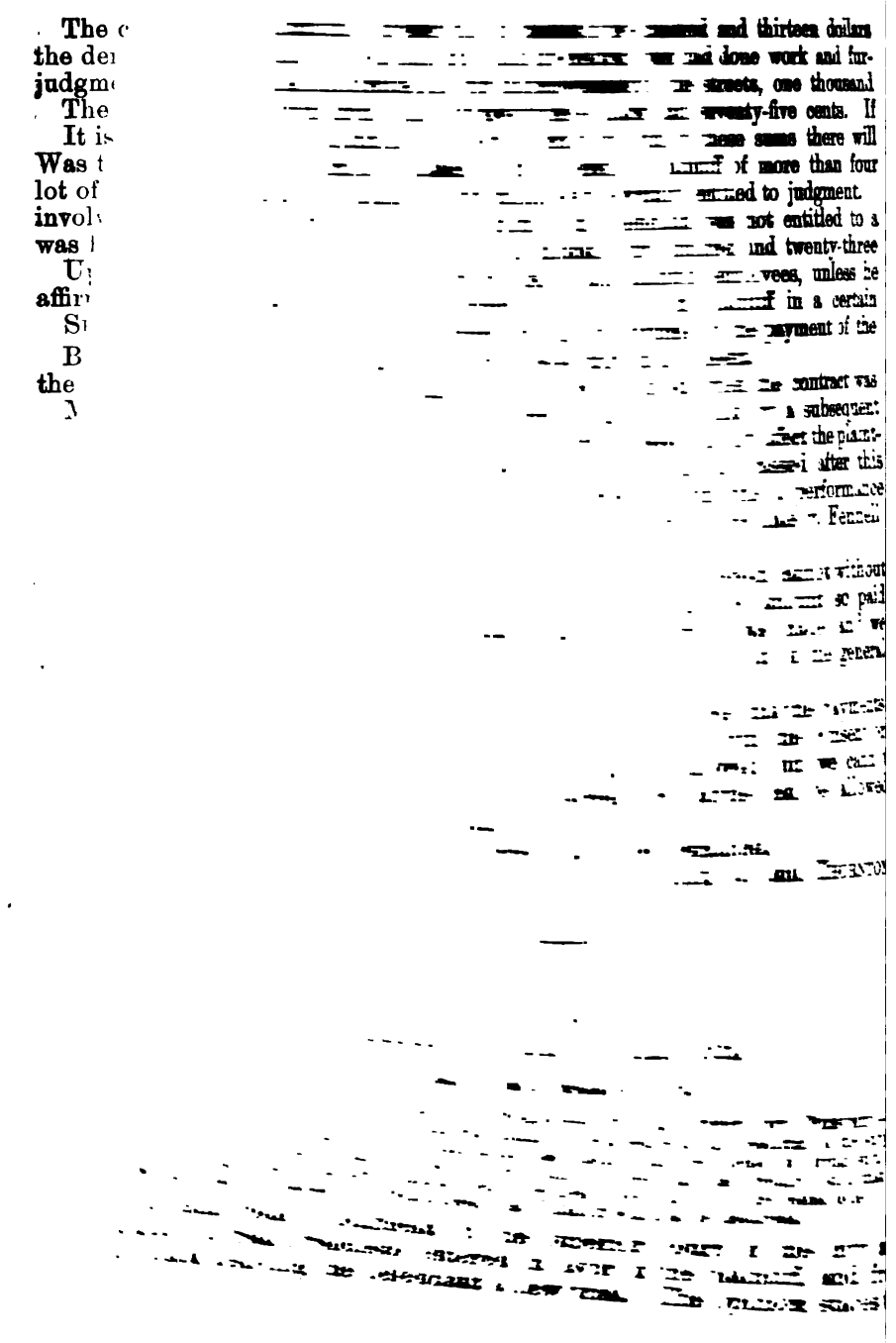
"Fourth—That the defendant paid to plaintiff on account of said contract in warrants on its treasurer drawn in his favor, and which were duly paid, the following amounts at the respective dates of February, 25, 1878, three hundred dollars; April 1, 1878, four hundred dollars; August 12, 1878, eight hundred and thirteen dollars and five cents—making the aggregate payments to him previously of one thousand five hundred and thirteen dollars and five cents.

"Fifth—That between the sixth day of July, 1878, and the sixth day of August, 1878, divers claims and statements were presented to the city clerk and filed with the mayor and common council of said city by laborers, sub-contractors and material-men, who had performed labor and provided materials for said plaintiff in the performance of said contract, and which were used therein, and which said claims were each indorsed and signed by said plaintiff and by writing indorsed on the same, admitted by him to be correct; and which said claims amounted in the aggregate to one thousand four hundred and twenty-three dollars and seventy-five cents, and which were duly paid by defendant.

"Sixth—That between the twenty-eighth day of June, 1878, and the seventh day of August, 1878, divers other claims and statements were presented by divers other persons, who claimed to have performed labor and furnished materials used in the performance of said contract, and were filed with the said mayor and common council and city clerk, and which claims and statements amounted in the aggregate to the sum of seven hundred and thirty-six dollars and twenty cents. That all of said last-named claims were disputed by said plaintiff, and that said disputes yet remain unsettled and are yet pending between said claimants, and said plaintiff, and an action is now pending to determine the same."

"As a conclusion of law from the foregoing facts the court finds that the defendant is entitled to judgment against the plaintiff for the costs in its behalf expended, and it is so ordered."

We do not think that the conclusion of law drawn by the court from the facts found is correct. The contract price for the work was three thousand four hundred dollars. The defendant paid the



Wilson & Wilson, for the appellant.

L. E. Bulkeley, for the respondent.

MYRICK, J. The plaintiff sued, as assignee of one Quimbie, to recover the amount of an alleged deposit made by Quimbie with defendant.

First. A point made by appellant (defendant) is: The plaintiff, being an attorney, cannot maintain this action, the assignment to him being void, because of section 161, penal code, viz.: "Every attorney who, either directly or indirectly, buys, or is interested in buying, any evidence of debt or thing in action, with intent to bring suit thereon, is guilty of a misdemeanor."

In the absence of any pleading on the subject, and of evidence showing that the assignment was taken with the intent to bring suit, will not presume from the fact that he is an attorney and has brought the suit, that he took the assignment with the criminal intent specified in the section above quoted.

Second. Upon the questions whether the defendant received the money as a banker, deposited on account of plaintiff's assignor, whether it was to go to the payment of the debts of the Carson Mill Company to defendant, and the other questions involved, the testimony was conflicting, and the verdict of the jury is decisive.

We see no error in the record.

The judgment and orders appealed from are affirmed.

McKEE, J., ROSS, J., MORRISON, C. J., MCKINSTRY, J., THORNTON, and SHARPSTEIN, J., concurred.

No. 7,701.

BRYANT v. BANK OF CALIFORNIA.

In Bank. Filed November 25, 1885.

SUPPLEMENTAL PROCEEDINGS—ACTION AGAINST DEBTOR OF JUDGMENT DEBTOR—SECTION 720 HELD UNCONSTITUTIONAL.—The provision of section 720 of the code of civil procedure purporting to authorize the judge, by order, to permit the judgment creditor to sue and maintain an action against the alleged debtor of the judgment debtor is unconstitutional and void, for the reason that, by such section, no notice to the judgment debtor of the proceeding is provided for; otherwise the alleged debtor of the judgment debtor might be compelled to pay twice.

APPEAL from a judgment of the superior court of the city and county of San Francisco, entered in favor of the plaintiff, and from an order denying the defendant a new trial. The opinion states the facts. The opinion in department is reported in 6 West Coast Rep.,

Wilson & Wilson, for the appellant.

L. E. Bulkeley, for the respondent.

MYRICK, J. The plaintiff herein, Bryant, had judgment against Quimbie; and such proceedings were had, under sections 714,

W. S. Goodfellow, for the appellants.

W. W. Pierson, *A. Compte, Jr.*, and *Jos. Naphtaly*, for the respondents.

FOOTE, C. A rehearing was granted to Henry Coubrough, one of the defendants herein. An examination of the record, petition for rehearing, and authorities, convinces us that the opinion delivered by department two of this court, on the thirtieth day of April, 1885, was in all respects correct: 6 West Coast Rep., 374.

The complaint upon which default was taken against Coubrough, stated facts amply sufficient to support the judgment. After asking for certain specific relief, the prayer of that pleading concludes as follows:

"And for such other or further and different relief in the premises as shall be just and equitable, and for the costs of this action."

The action was equitable in its nature. In Carpentier v. Brenham, 50 Cal., 552, it is said: "In courts of equity the rule is universal, that under the prayer for general relief no relief can be granted beyond that which is authorized by the facts stated in the bill; and to the same effect is our statute," meaning thereby section 147 of the practice act, which was in force when the action was tried, the language of which is identical with that of section 580, code of civil procedure. In Rollins v. Forbes, 10 Cal., 300, where a default was taken, this authoritative declaration was made: "If the specific relief asked cannot be granted, such relief as the case stated in the bill authorizes may be had under the clause in the prayer for general relief, and even in the absence of such clause where an answer is filed: Pr. act, section 147."

The judgment should be affirmed.

SEARLS, C., and BELCHER, C. C., concurred.

BY THE COURT. For the reasons given in the foregoing opinion, the judgment is affirmed.

No. 8,162.

SPENCER v. HOUGHTON.

In Bank. Filed November 25, 1885.

ESTATE OF MINORS—BOND OF GUARDIAN—SUBSTITUTED BOND MAY BE GIVEN—SURETIES.—Under sections 78, *et seq.*, of the probate act, made applicable to guardians by the act of March 27, 1857, the probate court had power to take a new bond from a guardian of the estate of a minor, to take the place of a former bond. After such new bond has been given, as a substitute for the former bond, sureties on the latter are not responsible for any defaults of the guardian occurring subsequent to the date of its filing.

THE SAME—ACCOUNTING BY GUARDIAN—SERVICE OF CITATION ON GUARDIAN—MAY BE BY PUBLICATION.—An order of the probate court, adjudging the amount due by such guardian, upon an accounting instituted by the ward, is not binding upon the sureties on the guardian's bond unless notice of the proceeding was given to the guardian, by citation, in conformity to sections 1,707, *et seq.*, of the code of civil procedure. The mere service on him of an order of the court directing him to file an account is not sufficient. Under section 1,709 of such code, the citation is to be served in the same manner as a summons in a civil action; consequently, if the guardian has left the state, the citation should be served on him by publica-

tion. Such service by publication is sufficient to give the court jurisdiction to bind the guardian by its order made upon a settlement of the account.

THE SAME—SURETIES ON BOND—RELEASE OF ONE RELEASES ALL.—Prior to the adoption of section 1,543 of the civil code, providing that "the release of one of two or more joint debtors, does not extinguish the obligations of any of the others," * * * the release of one of the sureties on the bond of a guardian, was a release of all; and, if the contract of suretyship was entered into prior to the enactment of such section, and subsequently one of the sureties is released, all are released. The right of the co-sureties to be released, under such contract, is a vested right of which they could not be deprived by subsequent legislation.

APPEAL from a judgment of the superior court of the city and county of San Francisco, entered in favor of the plaintiff, and from an order denying the defendant a new trial. The opinion states the facts. The prior opinion is reported in 6 West Coast Rep., 369.

John Reynolds, for the appellant.

Taylor & Haight, for the respondent.

THORNTON, J. This is an action against a surety on the bond of the guardian of plaintiff.

The facts are correctly stated in an opinion of Justice Myrick herein filed April 28, 1885, 6 West Coast Rep., 369, and we adopt that statement, which is as follows:

While the plaintiff, Josephine M. Spencer, was a minor, then Josephine M. Richardson, W. Harney was the guardian of her person and estate. In 1870 he was discharged as such guardian and H. M. Hastings was appointed in his stead, and after qualifying Hastings received from Harney ten thousand dollars, and upwards, property of the ward. Hastings' bond was in the sum of twenty-eight thousand dollars, with E. B. Mastick and A. A. Cohen as sureties, jointly and severally with Hastings, in the sum of fourteen thousand dollars, and with H. P. Livermore and H. H. Haight as sureties, jointly and severally with Hastings, in the sum of fourteen thousand dollars. On the fourteenth of September, 1871, Livermore filed a petition in the probate court to be discharged from liability for future acts of his principal, and such proceedings were had, that on waiver by Hastings of service of citation, the court made an order that said Hastings give other security in place of Livermore, as prayed for in said petition. On the twenty-first of September, 1871, and in pursuance of such order, said Hastings and the defendant herein, S. O. Houghton, executed a bond to said ward by which, after reciting the facts of the execution of the former bonds, the petition of Livermore and the order for other security, they bound themselves, Hastings as principal and Houghton as surety, in the place and stead of Livermore, jointly and severally in the sum of fourteen thousand dollars, portion of the sum of twenty-eight thousand dollars, the condition of the bond being that if said Hastings, as guardian, faithfully execute the duties of his trust according to law, the bond should be void, else to remain in full force and effect. On the tenth day of January, 1872, the said H. H. Haight filed a petition praying to be released from all responsibility on account of future acts of said Hastings,

and such proceedings were had, Hastings having waived service of citation, that on the same day the court made an order that said Hastings file another bond in the sum of twenty-four thousand dollars, it then appearing that the personal estate of the ward did not exceed twelve thousand dollars. Hastings accordingly, on the nineteenth of February, 1872, filed a bond in the sum of twenty-four thousand dollars, with sureties as follows: S. A. Hastings and B. S. Brooks, jointly and severally, in the sum of six thousand dollars, portion of said sum of twenty-four thousand dollars; John Currey and T. I. Bergin, jointly and severally, in the sum of six thousand dollars, portion as aforesaid; S. W. Holladay and H. K. W. Clarke, jointly and severally, in the sum of six thousand dollars, portion as aforesaid; and Earl Bartlett and J. H. Smyth, jointly and severally, in the sum of six thousand dollars, also portion as aforesaid. Upon the approval of this bond an order was made by the probate court that said Mastick, Cohen and Haight, sureties on the former bond, be released from all responsibility for the future acts of the guardian. The name of the defendant, Houghton, was not included in this order. On the eighteenth of October, 1877, after the said Josephine had attained majority, she executed to Haight, Mastick and Livermore an instrument acknowledging the receipt from them of one thousand five hundred dollars, and releasing them from all liability on the bond executed by them. On the tenth of September, 1877, she executed a like release to A. A. Cohen, acknowledging the receipt of five hundred dollars.

The said Hastings departed from this state in the fall of 1872, and never returned. The said Josephine attained majority February 11, 1874. The said Hastings having failed to file an account, the said court, on the twenty-fifth of March, 1878, on petition of the said Josephine, made an order that said Hastings file an account within thirty days after service on him of such order. No citation was issued, but a copy of the order was served upon Hastings on the tenth of April, 1878, at the city of Washington. Hastings did not file an account, and has never complied with the requirement of said order. After thirty days from the said service, the said Josephine, by her attorney, prepared an account from the records and papers on file in the probate court in said case, and filed the same, and petitioned the court that the same be allowed as and for the account of said Hastings. The said court thereupon fixed a day for the settlement of the account, and directed notice thereof to be given by posting. On the day fixed, the court appointed a referee to examine and revise the account, and after examination and the hearing of the evidence of witnesses produced by the said Josephine, the referee reported that there was a balance of six thousand and twelve dollars in favor of said Josephine due from said Hastings, and the court thereupon made an order settling the account as and for the final account of said Hastings, guardian, at the said sum of six thousand and twelve dollars.

Before the commencement of this action, plaintiff forwarded to Hastings a certified copy of the order settling the account, and demanded of him payment of the said sum due, but he refused and neglected to pay the same, or any part thereof. After the said Josephine attained majority, she executed releases to several of the sureties, for the consideration of five hundred dollars each, viz., September 10, 1877, to A. A. Cohen, and October 18, 1877, to H. H. Haight, E. B. Mastick, and H. P. Livermore. It appears from the report of the referee that other sureties paid to Josephine the sum of five hundred dollars each, viz.: T. I. Bergin, S. W. Holladay, Earl Bartlett, H. K. W. Clarke, B. S. Brooks, and S. A. Hastings.

The bond of the nineteenth day of February, 1872, was filed on that day by order of the probate court. The amount of the bond was fixed at twenty-four thousand dollars by the court in its order. This sum was double the amount of the ward's estate; and no doubt this was intended as a new bond to take the place of the former bonds. That the court had power to take a new bond and discharge the sureties on the bonds previously approved and filed, we have no doubt. The statute then in force gave such authority. See sections 78, 79, 80, 81, etc., of the probate act made applicable to guardians by the act of twenty-seventh of March, 1857: Stats. 1857, p. 120. This bond was, in our opinion, a new bond, given as a substitute for the other bonds, and the legal effect of it was, that Houghton was not responsible for any defaults of the guardian occurring subsequently to the date of its filing on the nineteenth day of February 1872. In other words, the taking a new bond in double the amount for which the court could require security, was substituting this last bond for the other bonds, and released Houghton from all defaults subsequently occurring: Lane v. The State, 27 Ind., 108; U. S. v. Wardwell, 5 Mason, 82.

Whether the default of the guardian herein occurred prior or subsequent to the nineteenth of February, 1872, does not appear distinctly, either from the evidence or findings. But the presumption must be indulged to sustain the judgment of the court that it occurred prior to the day in February, 1872, above mentioned.

We are further of opinion that the decree or order of the probate court made in 1878, adjudging the amount due by the guardian, did not bind the sureties. Hastings, the guardian, never had notice of this proceeding, and, therefore, the sureties were not bound. The service of the order of the court, made on Hastings in Washington city, was no service. Such service could only be made by citation: sections 1,707, 1,708, 1,709, code civil procedure; and here it appears that no citation was issued, but an order was made by the court and directed to be served.

It is said that Hastings had left the state at the time that it became essential to notify him, and that, therefore, the citation could not be served on him; and, further, that that it is provided in section 1,710, code civil procedure, that "when personal notice is required, and

no mode of giving it is prescribed in this title, it must be given by citation," and as there could be no personal service, the person to be cited having left the state, citation was not required. We are of opinion that service could be made in a mode provided by law. By section 1,709, code civil procedure, it is declared that "the citation must be served in the same manner as the summons in a civil action." A summons in a civil action can be served on a person who has departed from the state, by publication: sections 412, 413; and by section 1,709, above quoted, a citation can be served in the same way. The mode of procedure under this statute for serving summons by publication, where a person has departed from the state, or resides out of the state, etc., is applicable to the service of a citation, by publication.

As to what is enacted in section 1,710, code civil procedure, its meaning is that where *actual service* is directed to be made on the party *personally*, and not by publication, it must be made by citation. This is not inconsistent with service of a citation by publication in a case where the party to be served has departed from the state, or resides out of it. The two sections, 1,709 and 1,710, may thus be readily reconciled. It certainly could not have been the intention of the legislature to say in one section that a citation can be served by publication, and in the next that a citation could only be served by actual personal service.

From what has been said just above, our conclusion is that the account of Hastings, guardian, as settled by the probate court, having been made without such notice as the law required to the guardian, was not binding on Houghton, and was not admissible in evidence against him.

Nor do we concur in the view contended for by counsel for plaintiff that the service by publication of the citation would be a nullity. To sustain this view, counsel cites Pennoyer v. Neff, 95 U. S. Rep., 714, and Hart v. Sansom, 110 Id., 151. The features of the case before us are entirely different from those presented by these cases. Those features are that Hastings, a citizen of the state, is appointed and qualifies under its statutes as guardian of the person and estate of a minor and by virtue of this qualification and appointment gets into his hands the property of the minor. He binds himself by this appointment to make a true inventory of all the estate, real and personal, of his ward, that shall come to his possession or knowledge, and to return the same within such time as the judge of the court appointing him shall order; to dispose of and manage all such estate according to law, and for the best interest of his ward, and faithfully to discharge his trust in relation thereto; to render an account on oath of the property, estate and moneys of the ward in his hands, and all proceeds or interests derived therefrom, and of the management and disposition of the same, within three months after his appointment, and at such other times as the court shall direct or whenever it shall require, and at the expiration of his trust to settle his account with the probate judge or with the ward, if he be of full

The court sustained the demurrer to the complaint, and overruled the demurrer to the answer; and, the plaintiff declining to amend, judgment was entered in favor of the defendant.

The appeal is from that judgment.

It is apparent that the only question presented for decision is: Was the tax founded on the assessment in question, a lien upon the lot of land described in the complaint? A similar assessment was involved in the case of People v. Pittsburg Railroad Company, and was held by this court to be invalid: 8 West Coast Rep., 27.

Upon the authority of that case, the judgment here should be affirmed.

SEARLS, C., and FOOTE, C., concurred.

BY THE COURT. For the reasons stated in the foregoing opinion the judgment is affirmed.

MYRICK, J., and THORNTON, J., dissented.

No. 8,203.

MCGEE *v.* CITY OF SAN JOSE.

In Bank. Filed November 25, 1885.

DEBTOR AND CREDITOR—PAYMENTS FOR BENEFIT OF CREDITOR.—One person cannot, without authority, pay the debt of another, and charge the amount so paid against the party for whose benefit the payment was made.

CONTRACT WITH MUNICIPALITY—TERMS OF CANNOT BE CHANGED BY LEGISLATION.—A contract entered into with a municipality, which provides for a certain mode of payment by the city, cannot be changed by subsequent legislation, so as to authorize a performance different from that prescribed in the contract. And payments made, in conformity with such subsequent legislation, will not bind the contractor unless assented to by him.

APPEAL from a judgment of the superior court of Santa Clara county, entered in favor of the defendant, and from an order denying the plaintiff a new trial. The opinion states the facts. The opinion in department is reported in 6 West Coast Rep., 630.

Houghton & Reynolds, for the appellant.

D. W. Herrington, for the respondent.

MORRISON, C. J. This is an action on a contract for street work done in the city of San Jose under a contract between the plaintiff and the authorized agent of the city. The contract price for the work was the sum of three thousand four hundred dollars, "whereof seventy per cent should be paid in gold and thirty per cent in silver coin, in the manner prescribed by law, and in accordance with an act of the legislature of the state of California entitled 'An act to incorporate the city of San Jose,' approved March 17, 1874, by a warrant drawn upon the general fund in the treasury of said city by the mayor and common counsel thereof at the next general meeting of said mayor and common counsel, after the acceptance of said work, to be paid by the treasurer of said city out of said general fund in the proportions of gold and silver coin expressed in said

agreement." The contract was entered into on the tenth day of December, 1877. The case was tried by the court without a jury, and the following findings were made and filed by the judge:

"First—That on the tenth day of December, 1877, the contract, exhibit A, attached to the complaint in this action, was entered into between said plaintiff and the defendant through and by the then acting street commissioner of said city.

"Second—That said plaintiff performed the work in said contract provided for and completed the same on or about the — day of July, 1878.

"Third—That said work and improvement was accepted by the proper authorities after its completion, and on or about the — day of July, 1878.

"Fourth—That the defendant paid to plaintiff on account of said contract in warrants on its treasurer drawn in his favor, and which were duly paid, the following amounts at the respective dates of February, 25, 1878, three hundred dollars; April 1, 1878, four hundred dollars; August 12, 1878, eight hundred and thirteen dollars and five cents—making the aggregate payments to him previously of one thousand five hundred and thirteen dollars and five cents.

"Fifth—That between the sixth day of July, 1878, and the sixth day of August, 1878, divers claims and statements were presented to the city clerk and filed with the mayor and common council of said city by laborers, sub-contractors and material-men, who had performed labor and provided materials for said plaintiff in the performance of said contract, and which were used therein, and which said claims were each indorsed and signed by said plaintiff and by writing indorsed on the same, admitted by him to be correct; and which said claims amounted in the aggregate to one thousand four hundred and twenty-three dollars and seventy-five cents, and which were duly paid by defendant.

"Sixth—That between the twenty-eighth day of June, 1878, and the seventh day of August, 1878, divers other claims and statements were presented by divers other persons, who claimed to have performed labor and furnished materials used in the performance of said contract, and were filed with the said mayor and common council and city clerk, and which claims and statements amounted in the aggregate to the sum of seven hundred and thirty-six dollars and twenty cents. That all of said last-named claims were disputed by said plaintiff, and that said disputes yet remain unsettled and are yet pending between said claimants, and said plaintiff, and an action is now pending to determine the same."

"As a conclusion of law from the foregoing facts the court finds that the defendant is entitled to judgment against the plaintiff for the costs in its behalf expended, and it is so ordered."

We do not think that the conclusion of law drawn by the court from the facts found is correct. The contract price for the work was three thousand four hundred dollars. The defendant paid the

The court sustained the demurrer to the complaint, and overruled the demurrer to the answer; and, the plaintiff declining to amend, judgment was entered in favor of the defendant.

The appeal is from that judgment.

It is apparent that the only question presented for decision is: Was the tax founded on the assessment in question, a lien upon the lot of land described in the complaint? A similar assessment was involved in the case of People v. Pittsburg Railroad Company, and was held by this court to be invalid: 8 West Coast Rep., 27.

Upon the authority of that case, the judgment here should be affirmed.

SEARLS, C., and FOOTE, C., concurred.

BY THE COURT. For the reasons stated in the foregoing opinion the judgment is affirmed.

MYRICK, J., and THORNTON, J., dissented.

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Houghton & Reynolds, for the appellant.

D. W. Herrington, for the respondent.

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agreement." The contract was entered into on the tenth day of December, 1877. The case was tried by the court without a jury, and the following findings were made and filed by the judge:

"First—That on the tenth day of December, 1877, the contract, exhibit A, attached to the complaint in this action, was entered into between said plaintiff and the defendant through and by the then acting street commissioner of said city.

"Second—That said plaintiff performed the work in said contract provided for and completed the same on or about the — day of July, 1878.

"Third—That said work and improvement was accepted by the proper authorities after its completion, and on or about the — day of July, 1878.

"Fourth—That the defendant paid to plaintiff on account of said contract in warrants on its treasurer drawn in his favor, and which were duly paid, the following amounts at the respective dates of February, 25, 1878, three hundred dollars; April 1, 1878, four hundred dollars; August 12, 1878, eight hundred and thirteen dollars and five cents—making the aggregate payments to him previously of one thousand five hundred and thirteen dollars and five cents.

"Fifth—That between the sixth day of July, 1878, and the sixth day of August, 1878, divers claims and statements were presented to the city clerk and filed with the mayor and common council of said city by laborers, sub-contractors and material-men, who had performed labor and provided materials for said plaintiff in the performance of said contract, and which were used therein, and which said claims were each indorsed and signed by said plaintiff and by writing indorsed on the same, admitted by him to be correct; and which said claims amounted in the aggregate to one thousand four hundred and twenty-three dollars and seventy-five cents, and which were duly paid by defendant.

"Sixth—That between the twenty-eighth day of June, 1878, and the seventh day of August, 1878, divers other claims and statements were presented by divers other persons, who claimed to have performed labor and furnished materials used in the performance of said contract, and were filed with the said mayor and common council and city clerk, and which claims and statements amounted in the aggregate to the sum of seven hundred and thirty-six dollars and twenty cents. That all of said last-named claims were disputed by said plaintiff, and that said disputes yet remain unsettled and are yet pending between said claimants, and said plaintiff, and an action is now pending to determine the same."

"As a conclusion of law from the foregoing facts the court finds that the defendant is entitled to judgment against the plaintiff for the costs in its behalf expended, and it is so ordered."

We do not think that the conclusion of law drawn by the court from the facts found is correct. The contract price for the work was three thousand four hundred dollars. The defendant paid the

plaintiff in person one thousand five hundred and thirteen dollars and five cents, and paid his creditors, who had done work and furnished materials for the improvement of the streets, one thousand four hundred and twenty-three dollars and seventy-five cents. If the defendant is allowed credit for both of these sums there will still remain a balance to the credit of plaintiff of more than four hundred dollars, for which he was certainly entitled to judgment.

But we are of the opinion that defendant was not entitled to a credit for the sum of one thousand four hundred and twenty-three dollars and seventy-five cents, paid plaintiff's employees, unless he consented. The contract was to pay the plaintiff in a certain manner, and the contract was not performed by the payment of the money to plaintiff's employees without his consent.

There was nothing in the law as it existed when the contract was made authorizing such payment, and the fact that by a subsequent act of the legislature such a law was passed did not affect the plaintiff's right. The legislature could not by an act, passed after this contract was made, change its terms or authorize a performance different from that prescribed in the contract: Goodale v. Fennell, 27 Ohio St., 426.

It is a well settled principle of law that one person cannot without authority pay the debt of another, and charge the amount so paid against the party for whose benefit the payment was made; and we see nothing in the facts of this case which take it out of the general rule.

If it should appear on another trial of this case that the payments to other persons than the plaintiff were made with the consent or approval of the plaintiff, they should be allowed; but we cannot see how the claims in dispute between the parties can be allowed against the plaintiff's demand.

Judgment and order reversed and cause remanded.

MYRICK, J., ROSS, J., MCKINSTRY, J., MCKEE, J., and THORNTON, J., concurred.

No. 8,659.

BULKELEY *v.* BANK OF CALIFORNIA.

In Bank. Filed November 25, 1885.

ASSIGNMENT OF CLAIM—ACTION BY ATTORNEY—CRIMINAL INTENT NOT PRESUMED.—In an action by an attorney, on an assigned claim, in the absence of any pleading on the subject and of evidence showing that the assignment was taken with the intent to bring suit, the court will not presume, from the fact that he is an attorney and has brought suit, that he took the assignment with the criminal intent specified in section 161 of the penal code.

WHEN THE EVIDENCE IS CONFLICTING, THE VERDICT will not be disturbed.

APPEAL from a judgment of the superior court of the city and county of San Francisco, entered in favor of the plaintiff, and from an order denying the defendant a new trial. The opinion states the facts.

Wilson & Wilson, for the appellant.

L. E. Bulkeley, for the respondent.

MYRICK, J. The plaintiff sued, as assignee of one Quimbie, to recover the amount of an alleged deposit made by Quimbie with defendant.

First. A point made by appellant (defendant) is: The plaintiff, being an attorney, cannot maintain this action, the assignment to him being void, because of section 161, penal code, viz.: "Every attorney who, either directly or indirectly, buys, or is interested in buying, any evidence of debt or thing in action, with intent to bring suit thereon, is guilty of a misdemeanor."

In the absence of any pleading on the subject, and of evidence showing that the assignment was taken with the intent to bring suit, we will not presume from the fact that he is an attorney and has brought the suit, that he took the assignment with the criminal intent specified in the section above quoted.

Second. Upon the questions whether the defendant received the money as a banker, deposited on account of plaintiff's assignor, whether it was to go to the payment of the debts of the Carson Mill Company to defendant, and the other questions involved, the testimony was conflicting, and the verdict of the jury is decisive.

We see no error in the record.

The judgment and orders appealed from are affirmed.

MCKEE, J., ROSS, J., MORRISON, C. J., MCKINSTRY, J., THORNTON, J., and SHARPSTEIN, J., concurred.

No. 7,701.

BRYANT v. BANK OF CALIFORNIA.

In Bank. Filed November 25, 1885.

SUPPLEMENTAL PROCEEDINGS—ACTION AGAINST DEBTOR OF JUDGMENT DEBTOR—SECTION AUTHORIZING IS UNCONSTITUTIONAL.—The provision of section 720 of the code of civil procedure purporting to authorize the judge, by order, to permit the judgment creditor to institute and maintain an action against the alleged debtor of the judgment debtor is unconstitutional and void, for the reason that, by such section, no notice to the judgment debtor of the proceeding is provided for; otherwise the alleged debtor of the judgment debtor might be compelled to pay twice.

APPEAL from a judgment of the superior court of the city and county of San Francisco, entered in favor of the plaintiff, and from an order denying the defendant a new trial. The opinion states the facts. The opinion in department is reported in 6 West Coast Rep., 340.

Wilson & Wilson, for the appellant.

L. E. Bulkeley, for the respondent.

MYRICK, J. The plaintiff herein, Bryant, had judgment against one Quimbie; and such proceedings were had, under sections 714,

The act of February 28, 1883, repealed chapter 2 of title 6 of part 3 of the political code; also, "all laws concerning roads and highways in conflict with this act, and all laws applicable to particular counties of this state, concerning roads and highways, are hereby repealed."

It is contended by appellant that the effect of repealing the former law, coupled with the fact that by section 2,641, the boards of supervisors of the several counties are required to divide their respective counties into suitable road districts, and may change the boundaries thereof, must be construed as repealing all the existing road districts, and as Butte Mountain road district was organized by the board of supervisors before the passage of such act, its existence ceased with the repeal of the former law. We cannot accede to this view of the law.

Road districts under the former law were created by the ordinances or orders of the boards of supervisors, and the repeal of the law under which they acted did not have the effect of invalidating their lawful acts performed while the law was in force.

It might, we think, with equal propriety, be contended that an act of the legislature abolishing a court organized by virtue of a statute, rendered its judgments previously rendered null and void.

It is true, the statute, as amended in 1883, made it the duty of the supervisors to divide their counties into road districts, but until this was done all districts in existence under former laws continued to be and remain as such: Hall v. Superior Court, 63 Cal., 174.

The object of the new law was not to bring back chaos, but to establish a uniform system governing the highways of the state.

We cannot refer in detail to all the objections made by appellant to the proceedings in the court below. None of them are, as we think, of such a character as to demand a reversal of the judgment, which, with the order denying a new trial, should be affirmed.

FOOTE, C., and BELCHER, C. C., concurred.

BY THE COURT. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

No. 8,452.

CHRISTY *v.* SPRING VALLEY WATER WORKS.

In Bank. Filed November 25, 1885.

PARTITION—CONCLUSIVENESS OF JUDGMENT—EFFECT OF.—A judgment in an action of partition is conclusive as to the title under which the parties to the action hold in common the land partitioned between them. It does not have the legal effect of changing the title, or of vesting any new or additional title in the land allotted and set off to each in severalty. It has only the legal effect of severing the unity of possession.

THE SAME—DEFENDANT MUST DISCLOSE TITLE ACQUIRED PENDENTE LITE.—If a defendant in an action of partition, after he has filed his answer, but before the rendition of any interlocutory decree, acquires by deed, a new and independent title to the premises in controversy, he is bound on the trial to disclose the title so acquired; otherwise, the judgment of the court establishing the title, as it was found to exist in the tenants in common, at the date of its rendition, is conclusive upon all the parties as to whatever title or claims to the land they had *then* in the land. And in a subsequent action to recover possession of a tract awarded in severalty to a party to the action, such deed cannot be relied on to defeat the title established by the judgment in partition.

APPEAL from a judgment of the superior court of the city and county of San Francisco, entered in favor of the defendant, and from an order denying the plaintiff a new trial. The opinion states the facts.

I. N. Thorne, for the appellant.

Fox & Kellogg, for the respondent.

MCKEE, J. Appeal from a judgment for defendant and an order denying a motion for a new trial in an action of ejectment tried by the court without a jury.

The motion was heard and decided upon a statement of the case proposed, amended, settled and certified as required by subdivision 3 of section 659, code of civil procedure. The grounds of the motion were (1), insufficiency of the evidence to justify the decision; (2) the decision is against law; (3) errors of law; and the statement contained specifications of the particulars in which the evidence was alleged to be insufficient and of the particular errors of law upon which the moving party intended to rely.

Neither at the settlement of the statement, nor at the submission of the motion, was any objection made to any irregularity in the proceeding on the motion. The motion was contested and submitted for decision without objecting, or reserving any right to object, that the notice of the motion was not made or given according to law. Such being the case, the attorney of the corporation defendant waived any supposable irregularity in the *notice* of the motion, of which he now, in this court, for the first time seeks to avail himself.

The case as disclosed by the statement, is an action of ejectment to recover possession of four parcels of land situate in the city and county of San Francisco, and described as parts of outside land blocks Nos. 774, 775, 858 and 867. At the commencement of the action the Spring Valley Water Works was in possession of the lands, claiming to be seized in fee thereof, and that the plaintiff's right of action was barred by the statute of limitations.

The plaintiff's right of action is founded upon *mesne* conveyances of the property from one Robert S. Randall, to whom the property had been finally adjudged in severalty, on the twenty-third of December, 1875, in an action between himself and the Spring Valley Water Works and others, for the partition between them, as tenants in common, of a tract of land described as "that certain tract of land situated in the city and county of San Francisco and state of California, known as and being the southeast quarter of section 13, township 2 south, range 6 west, according to the United States survey of the state of California, and being more specifically and particularly described, as the same is delineated and shown on the map of the outside lands of the city and county of San Francisco, made under and by virtue of the provisions of order No. 800, as follows, to wit: All those certain blocks of land lying westerly of

the San Miguel rancho, and numbered respectively 853, 854, 855, 856, 857, 868, 869, 870, 871, 872, 945, 946, 947, 948, 949; also so much of each of the following numbered blocks of land as lies within the fences enclosing said tract of land erected by William Winter, John Kern and others, about the year 1861, to wit: blocks numbers 775, 776, 777, 778, 779, 780, 781, 852, 873, 944, 958, 957, 956, 955, 954, 953, 952, 950, 867, 858, all lying westerly of the San Miguel rancho."

To the complaint in that action the Spring Valley Water Works filed an answer in which it averred ownership "in fee and in severalty of a portion of said tract containing about thirty acres, more or less," and denied that the plaintiff was tenant in common with it, or with any other of the defendants in the action, in said lands, or owned any interest in the same in common with the defendants or any of them. But the court found that the plaintiffs and the defendants were tenants in common of the tract of land sought to be partitioned; that the plaintiff was entitled to three-eighths undivided interest in the tract, and the Spring Valley Water Works to five-eighths undivided interest therein, and upon the interlocutory decree entered upon ascertaining the respective interests of the parties, an order for partition was entered according to law. The interlocutory decree was entered October 13, 1871, and such proceedings were had under it, that there was allotted and set over to Randall that portion of the property which is described in the complaint in the present action, and to the Spring Valley Water Works a different portion of the partitioned premises. The allotments made were reported to the court, and the court on the twenty-third of December, 1875, "ordered, adjudged and decreed, that said report, and all things therein contained, do stand ratified and confirmed, and that the partition so made, as aforesaid, be firm and effectual forever."

That judgment was conclusive as to the title under which the parties to the action held in common the land partitioned between them: Morenhaut v. Higuerra, 32 Cal., 289. But it did not have the legal effect of changing the title, nor of vesting any new or additional title in the land allotted and set off to each in severalty. It had only the legal effect of severing the unity of possession: Wade v. Deray, 50 Cal., 376. So, at common law, when partition was made, pursuant to the writ *de partitione facienda*, and the shares are allotted in severalty, and final judgment is given, that the partition be holden firm and effectual forever, nothing further is necessary; for the partition is completely effected. The judgment of law operates to vest in each party a sole estate in his allotment; but nothing further is wrought than to affirm or ascertain the possession: Cave v. Holford, 3 Ves., 656.

Prima facie, therefore, the plaintiff was entitled to judgment against the defendant for the demanded premises, which had been allotted and set over to his grantor by the judgment in partition.

But by its decision the court below found ownership in fee of the demanded premises in the defendant at the commencement of the action. The decision is founded upon evidence of a new title acquired by the defendant. The evidence consisted of a deed, made on the fourth of January, 1871, by the city and county of San Francisco to George Turner, of a tract of land in the city and county of San Francisco, embracing the demanded premises; and a deed of said demanded premises executed and delivered by said Turner on the twenty-eighth of August, 1871, to the Spring Valley Water Works.

This deed was obtained by the defendant after it had filed its answer in the proceedings for partition, but before the rendition of any interlocutory judgment therein. By its answer it claimed to hold the land occupied by it adversely to the plaintiff; and, under the answer, it could have given the deed in evidence to sustain its claim, or it could have obtained permission to amend its answer so as to include the deed as evidence of a right in itself, acquired pending the proceedings.

In one way or the other, it was bound to disclose its adverse claims to the land, so that the court might ascertain and determine them: De Uprey v. De Uprey, 27 Cal., 329; Morenhout v. Higuerra, 32 Cal., 291; Bolla v. Navarro, 33 Cal., 465.

If they were not disclosed, the judgment of the court established the title, as it was found to exist in the tenants in common, at the date of its rendition, and it was conclusive upon all the parties as to whatever title or claims to the land they had *then* in hand.

Presumably, the title established by the judgment was derived by the original tenants in common from the city of San Francisco as the source of title. Being tenants in common under titles derived from that source, they need not have resorted to the statutory mode of proceeding for partitioning the lands which they held under it. They could have made a voluntary partition among themselves, by each particular tenant in common receiving from all the others a conveyance of the undivided shares of those others in the particular parcels of the tract intended to be allotted to that one respectively. If that mode had been followed, it is not doubtable that a conveyance, executed and delivered at the date of the judgment by the Spring Valley Water Works and the other tenants in common to their co-tenant Randall, of the parcels of the land allotted to him, would have passed to him all the right in the land which had been acquired through the Turner deed by the Spring Valley Water Works. The judgment in partition under the code works in the same way. In the one case the deed and in the other the judgment operates as an estoppel to the parties, making it so as to prevent either from impeaching the title of the other.

The deed from Turner to the defendant, pending the partition proceedings, did not, therefore, vest in the defendant a new title to the demanded premises which can be maintained against the title established by the judgment in partition, and the decision of the

court below, that it vested ownership in fee of the land in the defendant, is not sustained by the evidence, and is against law.

Judgment and order reversed and cause remanded.

MORRISON, C. J., ROSS, J., and MYRICK, J., concurred.

THORNTON, J., DISSENTING. I dissent. The title derived from Turner by the Spring Valley Water Works was never in issue in the partition suit mentioned in the prevailing opinion, and, therefore, was not bound by the judgment in that suit.

No. 8,944.

PIERCE *v.* GUITTARD ET AL.

In Bank. Filed November 25, 1885.

MARK TO DESIGNATE GOODS—FRAUDULENT IMITATION OF WITH INTENT TO DECEIVE ENJOINED—TRADE MARK.—Where one person who has established a business for his goods, carries it on under a given name or with a particular mark, it is a fraud on him for some other person to assume the same name or mark, or the same with a slight alteration, in such a way as to induce persons to deal with him in the belief that they are dealing with the person who has given a representation to the name or mark. In such case equity will enjoin the fraudulent use of such name or mark, whether the same constituted a trade mark or not.

APPEAL from a judgment of the superior court of the city and county of San Francisco, entered in favor of the defendants, and from an order denying the plaintiff a new trial. The opinion states the facts.

Charles P. Eells, for the appellant.

Wheaton & Harpham, for the respondents.

ROSS, J. The complaint alleges that the plaintiff for more than thirteen years next preceding the commencement of this action has been, and still is, engaged in the manufacture and sale of a chocolate called and known as "German Sweet Chocolate"—"the name of German being that of one Samuel German, who was on and before the nineteenth of June, 1867, employed and who has ever since been, and is now, employed by plaintiff in the manufacture of the said chocolate, and who, on said nineteenth of June, 1867, for a valuable consideration, duly assigned and transfered to the plaintiff the exclusive right to use his, the said German's, name upon the said chocolate so as aforesaid made and manufactured, and upon the labels and cases containing the same, and generally to use the said name of German as a trade mark therefor;" that the chocolate has long been well and favorably known in the trade and to the public generally by the name of "German Sweet Chocolate," and has been and is now extensively sold under that name, and now is, and for a long time has been, the source of large profits to the plaintiff; that during the time mentioned it had been, and still is, put up by the plaintiff in the form of a cake of about five inches in length and two and one-half inches in width, each cake inclosed in a wrapper and label, which has on a gilt background a green panel with ara-

besque border, in the center of which is a white star surrounded by the words "German Sweet Chocolate;" that the said wrapper and label with the said words and figures thereon were appropriated by plaintiff to his exclusive use as a trade mark to designate the origin and ownership of said "German Sweet Chocolate," and has been such ever since; that the defendants for more than four years last past have been and still are manufacturing and selling an inferior article of chocolate in the form of a cake similar in shape to the "German Sweet Chocolate" of the plaintiff, put up in wrappers and labels of about the same size and shape as the plaintiff's, and bearing the words "Sweet German Chocolate" in a green panel on a yellow or gilt background, with arabesque pattern; that the wrappers and labels of the defendants are fraudulent imitations of those of the plaintiff, and were and are calculated and intended by the defendants, and each of them, to deceive dealers and purchasers, and to mislead them into using their inferior article instead of, and as and for the chocolate manufactured by the plaintiff, and has had and continues to have that effect to the serious injury of the plaintiff. And the plaintiff prays a decree restraining defendants from making or causing to be made, or in any manner using wrappers or labels having upon them the words "Sweet German Chocolate" or any words, figures or designs resembling or imitating the words, figures and designs used by the plaintiff as his trade mark, and also for an accounting of profits alleged to have been made by defendants out of the alleged fraudulent sales, and for damages.

At the trial plaintiff was nonsuited, and the appeal is from the judgment given against him, as also from an order refusing him a new trial.

The plaintiff, after giving evidence that for many years he has manufactured at Dorchester, Massachusetts, a chocolate under the name of "German Sweet Chocolate," put up in the form and manner stated in the complaint, and sold throughout the country, testified as follows: "I applied the name of 'German Sweet Chocolate' to that chocolate at Dorchester in 1866. I applied it because it was a good name and I wished to place upon the market a new brand of sweet chocolate of improved manufacture. I got the name from Samuel German, and he authorized me to use it. In June, 1866, — about the time I commenced the manufacture,—I obtained it because I wanted to use his name and I wanted his authority to use it. In the earlier years of the manufacture by me of 'German Sweet Chocolate,' Samuel German was personally engaged in the manufacture of it, but owing to his advancing age and infirmities, he has been given lighter work to do since. The 'German Sweet Chocolate' has been sold and known to the trade under that name, and by the labels I have mentioned, since 1866. At the time I had adopted the name and those labels, no other chocolate was sold or known to the trade under similar symbols, or under a name of which the word 'German' formed a part. I appropriated the name 'German Sweet Chocolate, made by S. German, Dorchester,

Massachusetts,' to my exclusive use, as a trade mark for that chocolate, with the design, symbol and device as appear by the labels I have mentioned, and I still claim the same, as I always have, as my trade mark."

The witness gave further testimony tending to show that he has ever since sold his chocolate extensively throughout the United States and received pecuniary profits therefrom, and that the chocolate sold by the defendants under the name of "Sweet German Chocolate," is of inferior quality. Other witnesses testified that the chocolate sold by defendants is inferior to that of the plaintiff's, and is bought by the jobbers at a less price than plaintiff's chocolate can be bought for, and is retailed by them to the public as and for the "German Sweet Chocolate" of the plaintiff.

A witness named Doyle testified on behalf of the plaintiff, that he was in the employ of defendants as foreman at the time their label was gotten up, and had formerly been connected with a large house in New York that had the New York agency for Walter Baker & Company, of which firm the plaintiff was sole member, and that he was consulted by defendants in regard to the name to be put on their label; that defendant Guittard asked him what Walter Baker & Company called their chocolate, and he replied "German Sweet Chocolate," when Guittard said: "We will reverse it and call ours Sweet German Chocolate." This witness further testified: "I had many conversations with Guittard about Baker's chocolate before the one I have mentioned. The object of those consultations was to get at Baker's customers, whom I knew, being connected with the house that was their New York agent. That was the beginning of the consultations about Baker. He asked me who were the largest customers we had for Baker's goods in consultations we had, and I gave him the name of the large firms in Philadelphia, New York, Chicago, etc., to whom he sold his Sweet German Chocolate."

Upon this state of facts—which, as the case is presented, we must accept as true—we are of opinion that it is not necessary to decide whether the plaintiff's label, with the accompanying words and devices, constituted a trade-mark, and as such the exclusive property of the plaintiff, for the reason that it is a fraud on a person who has established a business for his goods and carries it on under a given name or with a particular mark, for some other person to assume the same name or mark, or the same with a slight alteration, in such a way as to induce persons to deal with him in the belief that they are dealing with the person who has given a representation to the name or mark: Lee v. Hawley, 5 Chy. App. Cas. L. R., 155. Equity gives relief, said the supreme court of the United States in McLean v. Fleming, 96 U. S., 251, "upon the ground that one man is not allowed to offer his goods for sale, representing them to be the manufacture of another trader in the same commodity. Suppose the latter has obtained celebrity in his manufacture, he is entitled to all the advantages of that celebrity, whether resulting from the greater demand for his goods or from the higher price the public are willing

to give for the article, rather than for the goods of the other manufacturer, whose reputation is not so high as a manufacturer. Where, therefore, a party has been in the habit of stamping his goods with a particular mark or brand, so that the purchasers of his goods having that mark or brand know them to be of his manufacture, no other manufacturer has a right to adopt the same stamp; because, by doing so, he would be substantially representing the goods to be the manufacture of the person who first adopted the stamp, and so would, or might be, depriving him of the profit he might make by the sale of the goods which the purchaser intended to buy."

That the unlawful purpose was deliberately designed and effectuated clearly appears from the testimony given at the trial. The motion for nonsuit should, therefore, have been denied.

Judgment and order reversed and cause remanded for a new trial.

MYRICK, J., MORRISON, C. J., and MCKEE, J., concurred.

No. 8,441.

GANAHL ET AL. *v.* SOHER ET AL.

In Bank. Filed November 25, 1885.

VOID SALES BY PROBATE COURTS—ACTION BY HEIR FOR PROPERTY SOLD, MUST BE BROUGHT WITHIN THREE YEARS AFTER SALE.—The provision of the probate act that "no action for the recovery of any estate, sold by an executor or administrator, under the provisions of this chapter, shall be maintained by any heir or other person claiming under the deceased testator or intestate, unless it be commenced within three years next after the sale," applies to all sales, void as well as voidable, made by probate courts, of real estate belonging to persons who have died since the passage of the probate act; and this, although the invalidity of the sale results from an insufficiency in the notice for the appointment of the administrator.

APPEAL from a judgment of the superior court of the city and county of San Francisco, entered in favor of the defendants, and from an order denying the plaintiffs a new trial. The opinion states the facts.

Carter P. Pomeroy, for the appellants.

H. J. Tilden, for the respondents.

ROSS, J. The plaintiffs claim title to the lot of land in controversy as the heirs at law of Henry Ganahl, who died intestate in the state of Georgia on the twelfth day of May, 1855. In 1867, one Andrew D. Smith filed in the probate court of the city and county of San Francisco, where the property is situate, a petition for letters of administration on the estate of said deceased, and an order was subsequently made by the court appointing him administrator. In the course of his administration of the estate, Smith presented to the probate court a petition for the sale of the property involved in the action, the court made an order directing its sale, and pursuant to that order it was sold and afterwards confirmed to one Leon

Smith, to whose interest the defendants subsequently succeeded. At the time of sale the plaintiff, Henry Gordon Ganahl, was a minor, but he attained his majority more than three years before the commencement of this action. With respect to the other plaintiffs, it is not denied that the five years statute of limitations barred whatever rights they acquired as heirs at law of the deceased Ganahl. But in addition to the five years statute, the defendants, among other defenses, plead the three years statute of the probate act. That statute, in force when the sale in question was made, provided that "no action for the recovery of any estate, sold by an executor or administrator under the provisions of this chapter, shall be maintained by any heir or other person claiming under the deceased testator or intestate, unless it be commenced within three years next after the sale." The succeeding section reserved to minors, and others under legal disability to sue, the right to commence such action at any time within three years after the removal of the disability.

If this provision of the probate act applies to the present case, the instruction of the court below was correct, and the verdict of the jury should not be disturbed. It is contended, however, on behalf of the appellant that it does not apply, because, as is claimed, the notice given of the application for the appointment of Andrew D. Smith as administrator did not conform to the statute, and that, therefore, his appointment was void. The regularity of the subsequent proceedings in the matter of the administration of the estate, in so far as mere matter of form is concerned, we do not understand to be questioned. In Harlan v. Peck, 33 Cal., 515, it was held that the provision in question "applies to all sales, void as well as voidable, made by probate courts, of real estate belonging to persons who have died since the passage of the probate act." Insufficiency of the petition for the sale was what rendered the sale in that case void, but there is no distinction in principle between the insufficiency in the petition for sale, or in the notice of sale, and insufficiency in the notice of the appointment of the administrator, or other insufficiency in the progress of the administration. In the case of McNeil v. First Cong. Soc., 4 West Coast Rep., 421, relied on by appellant, the court had no jurisdiction of the *subject matter*, for the reason that the deceased died prior to the passage of our probate law. In Pryor v. Downey, 50 Cal., 388, the point here involved did not arise. There is nothing in that case inconsistent with what was decided in Harlan v. Peck, on the authority of which case the judgment is affirmed.

MYRICK, J., and MORRISON, C. J., concurred.

THORNTON, J., CONCURRING. I concur in the judgment on the ground that the action is barred by the general statute of limitations.

No. 11,029.

MYRICK ET AL. v. SUPERIOR COURT OF CONTRA COSTA COUNTY.

In Bank. Filed November 25, 1885.

APPEAL FROM JUSTICE'S COURT—TRIAL IN SUPERIOR COURT.—The taking of an appeal from a justice's court on questions of law and fact does not give the appellant a right to have the action tried *de novo*, unless a trial upon the issues of fact as made in the justice's court had already been had in that tribunal. Thus, where issue is joined in the justice's court, but the action is dismissed, without trial, by the justice, upon the ground that the complaint, although actually filed, was not so indorsed, on appeal the superior court cannot try the issues. It should reverse the judgment and send the case back for trial on the issues tendered by the pleading.

APPLICATION for a writ of review. The opinion states the facts.

G. W. Bowie, for the petitioners.

Mills & Jones, for the respondent.

FOOTE, C. Application for a writ of review. The case in hand originated in justice's court to recover damages caused by the trespass of stock on plaintiff's land. A change of venue was obtained to another justice's court, but before such transfer of the cause an answer, demurrer and motion to dismiss had been filed by the defendant. When the action came on for trial a second motion was made by the defendant to dismiss it on the ground that the justice in whose court it was originally brought had failed to indorse on the complaint that it was filed as required by law. The motion was sustained and the case dismissed, a judgment being rendered in favor of the defendant for costs. Thereupon the plaintiff appealed upon law and facts to the superior court. There the point was made that such court had only jurisdiction to affirm or reverse the judgment of the justice's court, but had no power to try the case on the issues raised by the pleadings. But the appellate court took a different view of the matter, and trying the case upon the issues of law and fact, rendered a judgment for the plaintiff.

The taking of the appeal on "law and facts" would not give the right to have the action tried *de novo*, unless a trial upon the issues of fact as made in the justice's court had already been in that tribunal. Such issues were there made up, and there is no objection urged in any quarter that jurisdiction did not there exist to try the cause. The justice refused to enter upon such trial upon the ground that the complaint, although actually filed, was not so indorsed and dismissed the action.

If the superior court in this instance had a right to try a case upon issues of fact, which was within the jurisdiction of a justice of the peace, who had never passed upon such issues as tendered, the former tribunal might be said to have original jurisdiction in such cases, which is contrary to the statute.

It will not do to say that a justice of the peace by declining to perform so plain a duty, even under a mistaken opinion of law, can force an appellate tribunal to assume his place. He must first proceed to do what the law requires of him; then, if his judgment upon issues of fact be appealed from, a new trial of them can be had in

the manner declared by law to be appropriate. In effect, he dismissed the case at the costs of the plaintiff. The superior court should have reversed that judgment and sent the case back for trial on the issues tendered by the pleadings.

It could not have been contemplated by those who framed and passed the statute which controls the case, that an action which was within the jurisdiction of a justice of the peace could be tried on issues of fact in the superior court which had never been passed on by the lower tribunal.

It is claimed that in the case of the People *ex rel.* Hitchcock v. Freelon, 8 Cal., 518, a different view of the law as to this matter was taken. We see nothing there which conflicts with the position we here assume. In the former case the issues raised were passed on by the lower court and a trial *de novo* was possible, and it was simply held that where on appeal such trial was ordered, the county court might entertain it without sending it back to the former court.

In Curtis v. Superior Court, 63 Cal., 435, it was announced that an appeal would lie to the superior from a justice's court, where issues of fact had been raised and passed on without any evidence being given on the trial. There a trial was had because the lower court passed upon the issues of fact raised by the pleadings and exercised its jurisdictional functions by giving judgment thereon without any evidence to support its decision. And if error was thereby committed, it was reviewable on appeal. And a new trial being proper, it was rightfully allowed to take place in the appellate court.

In the case now being considered, the lower court did not pass upon the issues of facts raised by the pleadings or render any judgment thereon, but expressly refused to do so.

We conclude, therefore, that the action of the superior court of Contra Costa county in the premises was beyond its jurisdiction, the judgment rendered therein void, and should be annulled.

SEARLS, C., and BELCHER, C. C., concurred.

BY THE COURT. For the reasons given in the foregoing opinion, the judgment is annulled.

MYRICK, J. I do not concur.

No. 8,565.

BRADLEY *v.* SUPERIOR COURT OF ALAMEDA COUNTY.

In Bank. Filed November 25, 1885.

APPLICATION for a writ of review held without merit.

APPLICATION for a writ of review.

Geo. W. Tyler, for the petitioner.

THE COURT. Application for a writ of review. We find no merit in the application and it must be denied and dismissed. So ordered.

No. 20,098.

PEOPLE v. LEE.

Department Two. Filed November 25, 1885.

CRIMINAL LAW—CONTINUANCE OF TRIAL—DEFENDANT WHEN ENTITLED TO—ABSENCE OF WITNESSES.—The refusal, in a criminal case, to grant the defendant a continuance of the trial, on account of the absence from the county of witnesses in his behalf, is error, when it appears, from the uncontradicted affidavit of the defendant, that such witnesses were reasonably subpœnaed; that the facts, stating them, which the defendant expected to prove by them were material to the defense; that he could not prove the same facts by any other witnesses, and that he expected to be able to procure their attendance if the trial was postponed.

THE SAME—SELF-DEFENSE—DANGER TO LIFE OR LIMB NEED NOT BE SHOWN BEYOND REASONABLE DOUBT.—To establish the plea of self-defense it is not necessary that the fact of damages to life or limb should be shown by the evidence beyond a reasonable doubt; and an instruction to that effect is erroneous.

THE SAME—CHARACTER OF DEFENDANT—EVIDENCE—REASONABLE DOUBT.—In a criminal prosecution the consideration, by the jury, of evidence of the defendant's character is not confined to cases where the guilt of the accused is doubtful. The jury must take such evidence into consideration for the purpose of determining whether it *creates* a reasonable doubt of his guilt.

APPEAL from a judgment of the superior court of Mono county, entered upon a verdict convicting the defendant, and from an order denying him a new trial. The opinion states the facts.

Wm. O. Parker, *W. H. Virden*, and *Paul W. Bennett*, for the appellant.

E. C. Marshall, attorney general, for the respondent.

MORRISON, C. J. The defendant was convicted in the superior court of the county of Mono, on an information charging him with an assault with intent to commit murder, and from the judgment of conviction, as well as from the order denying his motion for a new trial, he appeals to this court.

It will not be necessary for us to examine all the alleged errors imputed to the court below, particularly those in connection with seventy instructions in the case, as the judgment will have to be reversed upon the first point made on the appeal.

When the case was called for trial in the court below, defendant interposed a motion for continuance, which was denied. The basis of the application was the non-appearance of two witnesses in behalf of the defense. These witnesses, named Hayes and Hill, were absent from the county of Mono, and were, respectively, in the counties of Mariposa and Calaveras. The defendant, in order to have them subpœnaed, according to the statute in such case provided, made the affidavit and procured the order named in section 1,330 of the penal code, and, in pursuance thereof, the witnesses were duly and regularly subpœnaed in the counties where found. Notwithstanding this fact, they failed to appear at the trial, and, in consequence of their non-appearance, defendant moved the court for a continuance of the cause, which motion was denied. The motion was accompanied by an affidavit showing due service of a subpœna; what facts the defendant expected to prove by the absent witnesses; that the facts (stating them) were material to the defense; that he

could not prove the same facts by any other witnesses, and that he expected to be able to procure their attendance if the trial was postponed to some future day. The sufficiency of the affidavit was not questioned by the attorney for the people, but the motion was denied for the reasons stated in the following order:

"The court then and there denies the defendant's motion for a continuance of the trial of said cause, giving as a reason for denying the same that the court is the guardian of the interests of the county; that a jury is already in attendance and the court cannot put the county to the expense of calling another jury, and that it may appear during the course of the trial that other witnesses could testify to the same facts as mentioned in defendant's affidavit for continuance; and the affidavit shows that the evidence would be cumulative."

The only proper reason given by the court for denying the defendant's motion for a continuance is, that the affidavit shows that the evidence would be cumulative. We fail to find any such thing in the affidavit. On the contrary, the affidavit states "that the said facts which affiant can prove by Hayes and Hill (the absent witnesses) cannot be proved by any other person or persons." By section 1,052 of the penal code, it is provided that "when an action is called for trial, or at any time previous thereto, the court may, upon sufficient cause, direct the trial to be postponed to another day."

Under the provisions of the law, as well as under article 1, section 13, of the constitution, the defendant was entitled to the personal attendance of his witnesses at the trial, and on a proper showing (which was made in this case) to a continuance, and it was error to deny such motion. It was so held by the court in the case of People v. McCory, 41 Cal., 458. The court there says: "There was a sufficient showing as to the materiality of the absent witnesses, and there was apparently no lack of diligence in the effort to procure their attendance. The attorney general has failed to point out any particular wherein the affidavit was defective, and I discover none. I think the showing was sufficient, and the motion should have been granted, particularly as this was the first motion for a continuance." All that was said by the learned justice (Crockett) in the foregoing case applies with full force to the case we are now considering.

There are errors assigned which it is unnecessary for the court to pass upon, excepting some in relation to the instructions. As we have already remarked, about seventeen instructions were moved by the prosecution and fifty-eight by the defense. It is reasonable to suppose that these instructions embodied all the law it was necessary to give the jury, but after passing on these instructions and giving a large number of them to the jury, the court proceeded of its own motion further to charge the jury, and in such charge fell into at least two errors, which will be noticed.

The court said: "You will apply the evidence in this case to the law of justifiable homicide, I have read to you, and if you believe from the evidence, *beyond a reasonable doubt*, that the defendant a

the time he fired the shot was in imminent danger of losing his life or of having inflicted upon him a great bodily injury," etc. It was not necessary that the fact of danger to life or limb should be shown by the evidence beyond *a reasonable doubt* to entitle him to acquittal, and we cannot say that the defendant was not prejudiced by such an erroneous instruction at the end of the charge to the jury.

Another error occurs in the closing part of the charge which is equally serious and erroneous. Charging the jury on the question of good character the court said: "Evidence of character can only be considered in relation to the particular crime charged in cases where the guilt of the accused is doubtful."

This is contrary to the rule laid down by the supreme court in numerous cases. It will be sufficient to refer to two or three of these cases: People v. Ashe, 44 Cal., 288; People v. Bell, 49 Id., 485. In the latter case the court says: "The jury must take such evidence [of character] into consideration for the purpose of determining whether it *creates* a reasonable doubt of his guilt."

It is not improper for us to call the attention of the court below, as well as other superior judges, to the suggestion of Justice Baldwin in the case of People v. Gibson, 17 Cal., 283, on the subject of instructions to the jury in criminal cases.

Judgment and order reversed, and cause remanded for a new trial.

MYRICK, J., concurred.

THORNTON, J. I concur in the judgment.

No. 9,334.

EASTERBY v. CITY OF NAPA.

Department Two. Filed November 25, 1886.

APPEAL HELD WITHOUT MERIT.

APPEAL from an order of the superior court of Napa county, denying the plaintiff's motion for a change of the place of trial.

B. S. Brooks and *Wm. Leviston*, for the appellant.

W. F. Henning and *Estee & Boalt*, for the respondent.

BELCHER, C. C. The appellant has failed to file any points and authorities, and, after examining the record, we see no merit in his appeal. The order should, therefore, be affirmed.

SEARLS, C., and FOOTE, C., concurred.

BY THE COURT. For the reasons given in the foregoing opinion, the order is affirmed.

No. 8,348.

WOOD *v.* BRADLEY ET AL.

In Bank. Filed November 25, 1885.

FORECLOSURE OF ASSESSMENT LIEN—EXTINGUISHMENT OF PRIOR LIEN.—Judgment affirmed for the reasons given in the opinion of the department, reported in 5 West Coast Rep., 234.

APPEAL from a judgment of the superior court of the city and county of San Francisco, entered in favor of the defendants. The facts are stated in the opinion in department, reported in 5 West Coast Rep., 234.

J. M. Wood, for the appellant.

Parker, Shafter & Waterman, for the respondents.

MYRICK, J. This case was decided by this court in department one, January 20, 1885, 5 West Coast Rep., 234. Hearing in bank having been granted and had, we are satisfied with the reason given in department, the judgment is, therefore, affirmed.

ROSS, J., MCKEE, J., MORRISON, C. J., MCKINSTRY, J., and THORNTON, J., concurred.

No. 9,996.

SAN FRANCISCO *v.* LOW.

In Bank. Filed November 25, 1885.

SUPPLEMENTAL TAX ROLL INVALID.—Judgment affirmed on authority of People v. Pittsburg R. R. Co., *ante*, page 27.

APPEAL from a judgment of the superior court of the city and county of San Francisco, entered in favor of the defendant. The facts were similar to those in People v. Pittsburg R. R. Co., *ante*, page 27.

David McClure, W. T. Baggett and *J. A. Waymire*, for the appellant.

McAllister & Bergin, Pillsbury & Blanding, Wilson & Wilson, Jarboe & Harrison and *Floyd & Wood*, for the respondent.

THE COURT. This case presents for decision precisely the same question as was involved in People v. Pittsburg Railroad Company, *ante*, page 27. Upon the authority of that case, the judgment here is affirmed.

MYRICK, J., and THORNTON, J., dissented.

WEST COAST REPORTER.

WHOLE No. 102. DECEMBER 10, 1885. VOL. VIII. No. 6.

SUPREME COURT OF COLORADO.

HALL ET AL. *v.* HALE.

October Term, 1885.

MINING CLAIM—LOCATION—ANNUAL WORK—EXTENSION OF TIME FOR DOING.—Appellee located the claim in controversy on June 7, 1878. On August 7, 1878, he ceased work on the property, and did none during 1879. On June 12, 1880, appellants relocated the premises. Thereafter, in September, 1880, appellee re-entered and performed one hundred dollars worth of work. *Held*, that the appellee had not abandoned the claim, that under the act of congress of January, 1880, amending section 2,324 of the United States revised statutes, the time in which he could perform the annual labor was extended to December 31, 1880.

APPEAL from the district court of Ouray county. The opinion states the facts.

John G. Taylor and *S. P. Rose*, for the appellants.

H. O. Montague, for the appellee.

HELM, J. The only controversy in this case relates to the performance of annual labor under act of congress of January, 1880. Appellee located the Geneva lode on the eighth day of June, 1878; on the seventh of August following, he ceased work upon the property. Nothing was done by him in 1879, and on June 12, 1880, appellants relocated the premises as abandoned ground, calling it the Empire lode. Thereafter, and in September, 1880, appellee re-entered and performed one hundred dollars worth of work.

The act of congress above mentioned is an amendment of section 2,324, revised statutes of the United States, and reads as follows: Provided, that the period within which the work to be done annually on all unpatented mining claims shall commence on the first day of January succeeding the date of location of such claim; and this section shall apply to all claims located since the tenth day of May, 1872.

Under the law, as it stood at the date of the Geneva location, the work done by appellee held the claim only until June 8, 1879. It would have been necessary for him to perform an additional one hundred dollars' worth of work by June 8, 1880. The foregoing statute, adopted January 22, 1880, could not be retro-active, so as to divest a right appellee had already acquired under the law. Congress could not say to him: It is true that, by the law as it now stands, you have a right to perform this annual labor at any time prior to

June 8, 1880, but we propose to cut off six months of that time and limit you to the calendar year ending December 31, 1879. Such a construction would not be tolerated. To so hold might result in a legislative forfeiture of a man's property without any fault on his part. The first of January, 1880, had passed before appellee could possibly know of the law, and, therefore, it would be an absolute impossibility to comply with its provisions, if he had not previously chanced to do so. If congress could take away six months of the time theretofore allowed, they could deprive him of eleven. Supposing appellee had located on the eighth day of December instead of June, he would then have had until the eighth day of December, 1880, to perform the work. But, adopting the foregoing interpretation, his year would be reduced to twenty-three days.

Congress entertained no such intention. What did that body mean, then, by saying that the act should apply to claims located during the seven and one-half years prior to the date of its passage? Simply this: That, as to such locations, the calendar year should also be the period for performing the annual labor; and the statute must be construed, in cases like this, to operate as an extension and not as an abridgement of the locator's time. It must be held to have given appellee until the thirty-first day of December, 1880, to perform the labor, which, without the statute, he was required to do upon the property by the eighth day of June preceding.

It follows, therefore, that on the twelfth day of June, 1880, the property was not subject to re-location; and that the attempted re-location thereof by appellant was void.

The judgment is affirmed.

PACKER *v.* PEOPLE.

October Term, 1885.

MURDER—REPEAL OF LAW PRESCRIBING PUNISHMENT.—Where the law authorizing and prescribing the punishment for murder is repealed, without a saving clause, after a murder has been committed, a conviction therefor cannot be had under a law subsequently enacted.

THE SAME—CONCLUSION OF INDICTMENT.—An indictment for murder, which concludes that the killing was done "against the peace and dignity of the people of the state of Colorado," will not be quashed although it is shown by the indictment that the crime was committed when Colorado was a territory.

THE SAME—MANSLAUGHTER INCLUDED IN MURDER.—Manslaughter is an included offense in the crime and charge of murder, and is sufficiently charged and covered by a good indictment for murder.

THE SAME—VOID CONVICTION—ONCE IN JEOPARDY.—If a defendant is convicted of murder, in a proceeding, wherein the court was without jurisdiction to try him for that crime, he has not been once in jeopardy, and may subsequently be tried for manslaughter.

A REPEAL OF LAWS PRESCRIBING THE PUNISHMENT FOR MURDER is not a repeal of laws affecting the crime of manslaughter.

ERROR to the district court of Hinsdale county. The opinion states the facts.

Haines & Brown, for the plaintiff in error.

T. H. Thomas, attorney general, for the defendant in error.

BECK, C. J. The plaintiff in error, Alfred Packer, was indicted, tried and convicted at the April term, 1883, of the district court of Hinsdale county for the murder of one Israel Swan.

The indictment charges that said murder was committed by the prisoner in Hinsdale county, on the first day of March, 1874, said Hinsdale county then being in the territory of Colorado, but at the time of the trial in the state of Colorado.

The jury returned a verdict of guilty as charged in the indictment, and that the killing was premeditated.

Motions for new trial and in arrest of judgment were made, and overruled by the court below. The prisoner was then sentenced to be executed; whereupon, a writ of error was sued out of this court, and made to operate as a *supersedeas* so as to stay the execution of the sentence until we could review the proceedings on error.

The case has been argued and submitted, and we proceed briefly to pass upon such questions as appear to demand attention.

Several errors have been assigned, but counsel for prisoner say, in their brief filed in the cause, that the only errors relied upon in this court, are those which question the validity of the indictment; and that it will be unnecessary to refer to others, inasmuch as the case will have to be reversed under the rule established in the case of Garvey v. People, 6 Col., 559.

We agree with counsel for the prisoner, that the judgment must be reversed. The sections of the criminal code which authorized and prescribed the punishment for murder were repealed by the legislature without a saving clause, *after* the crime was committed, and *before* the conviction now complained of. This point was raised and carefully considered in the Garvey case, and we have no reason for changing the views there expressed. The motions for new trial and in arrest of judgment should have been allowed. Going back, however, to the indictment, we think the court ruled correctly in denying the motion to quash it. That pleading appears to have been correct in form and substance.

The objection made to the concluding clause of the indictment, appears to us to be wholly without merit. It was that the indictment concludes that the killing was committed *against the peace and dignity of the people of the state of Colorado;* whereas, say the counsel, there was no state of Colorado in existence at the time of the killing in March, 1874. True, the form of government has been changed since the latter date, from a territorial form, to that of a state. The views of attorney general Urmy, that no rights were forfeited by the transition, is an answer to this whole line of argument. The same citizens who comprised the territorial government, were the citizens who framed and adopted the state constitution, and upon its taking effect they immediately became citizens of the new state. Instead of sweeping away, by a dash of the pen, the laws which had been made by this same citizenship, and by which the territory had been governed for many years—the whole body of laws was preserved by the constitution as the laws of the state, both in civil and in criminal

matters until they should be amended or repealed by the state legislature, and other provisions made to supply their place.

Section 1 of the schedule declares that all laws in force at the adoption of the constitution, not inconsistent, should remain as of the same force as before, until they expired by their own limitation, or are altered or repealed by the general assembly; also, that all prosecutions and rights of actions shall continue as if the form of government had not been changed, when not inconsistent with the constitution.

Section 2 provides, among other things, that "all indictments which have been found, or hereafter may be found, and all informations which have been filed, or may hereafter be filed, for any crime or offense committed before the constitution takes effect, may be proceeded upon as if no change had taken place, except as otherwise provided in the constitution."

These are necessary saving clauses, and proper to be inserted in a constitution, for while it is not the business of the framers of a constitution like ours to prepare and submit to the people a code of laws, it is their duty to preserve existing laws until the legislature, the proper law-making body, can be convened to amend or repeal such existing laws as they think proper, and to prepare such new laws as appear to them necessary for the benefit of the new state. We do not agree, however, with the attorney-general, that past transactions or crimes *shall* be prosecuted under the laws so preserved by the constitution, after the same have been modified or repealed. The saving clause inserted in a constitution, for the purpose stated, is of the same force as a saving clause in a statute; the whole may afterwards be repealed by the legislature without a further saving, and the ends of justice may be thus partially or wholly defeated, according to circumstances.

Mr. Cooley, in his Constitutional Limitations, p. 47, thus speaks of the functions of a state constitution: "It is not the beginning of a community, nor the origin of private rights; it is not the fountain of law, nor the incipient state of government. * * * It grants no rights to the people, but is the creature of their power, the instrument of their convenience Designed for their protection in the rights and powers which they possessed before the constitution was made, it is but the frame-work of the political government, and necessarily based upon the pre-existing condition of laws, rights, habits and modes of thought."

Referring again to sec. 2 of the schedule, we remark, that it preserved the law concerning murder as it existed before the adoption of the constitution, so as to enable the courts to punish crimes of this character, committed under the territorial organization. This effect continued until the sections of the former statute prescribing the punishment, were repealed by the state legislature. In the present case, this occurred before the trial of the accused. There was an exception in the constitutional saving clauses, but it in no way invalidated the prosecutions referred to. It simply required

all process to run in the name of "*The People of the State of Colorado*," and all prosecutions to be carried on in the name and by the authority of "*The People of the State of Colorado*;" and to conclude, "against the peace and dignity of the same."

This was a proper and legitimate constitutional provision, and in no manner infringed the rights of those accused of having committed offenses prior to the adoption of the constitution.

It was but a simple requirement that the form of process and proceedings in the courts should run in the name of the state, whether the subject matter of litigation arose prior or subsequent to the change in the form of the government.

Such objections to the indictment in this case are without force, since the form complained of in no way prejudices the rights of the plaintiff in error.

The prisoner's counsel contend that he has been once in jeopardy, and that he cannot now be remanded for trial upon the included offense of manslaughter contained in the indictment, but that the judgment must be reversed and the prisoner unconditionally discharged. This proposition cannot be maintained. A similar application was made in Garvey's case, after the judgment of reversal. It was contended, upon the hearing of a writ of *habeas corpus*, that the condition of the law was such, at and since his trial for murder, that he could not lawfully be tried for any offense charged in the indictment. We denied this application for a discharge, for reasons given in the opinion. See Garvey's case, 7 Col., 384; 3 West Coast Rep., 1.

We still entertain the views there expressed. The basis of the application here, is former jeopardy. But Packer has never been in legal jeopardy on account of his crime. The proceedings attending his trial and sentence were clearly illegal, and on account of the errors committed we reverse the judgment.

Under the changed condition of the statute, the court erred in putting Packer upon trial for murder, for the reason that no law was then in existence to punish him for that offense. It erred in charging the jury that if certain allegations were found to be true, they must return a verdict of guilty of murder.

It also erred in overruling the motions for new trial and in arrest of judgment, and in pronouncing, upon the verdict of the jury, the death sentence. Section 18 of article 2 of the constitution provides: "If the judgment be reversed for error in law, the accused shall not be deemed to have been in jeopardy."

Manslaughter has always been recognized as an included offense in the crime and charge of murder, and to be sufficiently charged and covered by a good indictment for murder.

The legislature of 1881 repealed only two sections of the law of homicide, being those which related wholly to the punishment for murder. Neither the law, practice, or proceedings concerning this class of offenses, were interfered with by that body.

Subsequently the legislature of 1883 amended the law of manslaughter, but with a saving clause, that when such crime was committed before that revision, it should be enquired of, prosecuted and punished in accordance with the law in force at the time of its perpetration: Laws 1883, page 151, sec. 5.

We have seen that there was no force in the objections to the form of the indictment in this case. No such change has been made in the law, as would render the indictment in this case wholly void. The crime of murder has always existed in the territory and state of Colorado, without change as to the elements of crime necessary to constitute the statutory offense. It has consequently always been an indictable offense. The form of the indictment, as well as the proceedings for its trial and punishment have always been substantially the same as at common law.

The district court, as stated, committed errors of law in the judgment and proceedings below, but there appearing to be no substantial objection to the indictment, we preceive no reason why the prisoner may not be put upon his trial thereon for the crime of manslaughter.

Another claim made by the plaintiff in error, or counsel for him, is, that he is the recipient of a legislative pardon, and entitled to be discharged from custody on that ground.

It is argued that the act of the legislature of March, 1881, upon its approval by the governor, operated and was a legislative pardon as to all past crimes of the grade of murder, and by virtue of that act the crime itself was wiped out so effectually that the prisoner cannot be tried or punished for any offense arising out of the same transaction. We cannot endorse this proposition. Manslaughter, as well as murder, is a clearly defined statutory offense, indictable as such, and with statutory penalties attached. It has always been punishable according to the law in force at the time of the commission of the offense.

We have recognized the rule, that under our statute an indictment for murder includes the minor offense of manslaughter, and the accused may be found guilty of manslaughter under such an indictment if the proof warrants such a verdict.

It may also be conceded that if a prisoner be indicted for murder, and the jury return a verdict of "not guilty," that he cannot thereafter be convicted of manslaughter. In the present case, however, the finding was guilty of murder, whereas the court was without jurisdiction to try the prisoner for that crime.

The whole proceedings subsequent to the indictment, therefore, being null and void, and it being necessary to reverse and set aside the judgment, for this cause, he cannot be said to have been tried upon the charge of manslaughter, much less to have been either pardoned or acquitted of the offense.

The judgment of the district court is reversed, the motion to discharge the prisoner denied, and the cause remanded for further proceedings according to law.

CITY OF DENVER v. VERNIA.

October Term, 1885.

MUNICIPAL CORPORATIONS—DAMAGE TO PRIVATE PROPERTY—IMPROVING STREETS.—A constitutional provision that "private property shall not be taken or damaged for public use without just compensation," will not give an abutting owner a right to recover from a municipal corporation, for injuries caused by a reasonable change or improvement of the street, by the proper authorities, in a careful manner.

THE SAME—OFFICIAL GRADE—ESTABLISHED BY ORDINANCE.—Where the grade of a street has been fixed by ordinance, one who purchases abutting property, is not warranted in relying upon the outward appearance of the street in determining the grade; it is his duty to inquire of the proper city officers.

THE SAME—REDUCING STREET TO OFFICIAL GRADE.—Where the official grade of a street and an adjoining sidewalk are the same, they should each be reduced to the established level at the same time. A failure so to do will render the city liable for injuries resulting to an abutting land owner.

APPEAL from the county court of Arapahoe county. The opinion states the facts.

Frank Telford and *John C. Stallcup*, for the appellant.

G. H. Gray, for the appellee.

BECK, C. J. This is an action against a municipal corporation for damages to property fronting upon a public street, which damages are alleged to have been caused by the grading of a sidewalk immediately in front of such property.

The trial was to the court without a jury, and the finding and judgment were in favor of the plaintiff below, Thomas Vernia, the amount thereof being the sum of one thousand two hundred dollars. Exceptions were saved to the finding and judgment, which we deem sufficient to authorize us to review the case upon the law, under sec. 413 of the code of civil procedure, which section provides as follows: "Exceptions taken of opinions and decisions of the district and county courts, upon the trial of causes in which the parties agree that both matters of law and fact may be tried by the court, shall be deemed and held to have been properly taken and allowed; and the party excepting may assign for error, before the supreme court, any decision or opinion so excepted to, whether such exception relates to receiving improper, or rejecting proper testimony, or to the final judgment of the court upon the law and the evidence."

The plaintiff, Vernia, alleges in his complaint that on or about December 23, 1881, he purchased two lots fronting on Larimer street, in the city of Denver, between Twenty-fifth and Twenty-sixth streets, and that he afterwards erected two brick store buildings upon the surface of said lots, and fronting upon said street. He alleges that the street had been graded slightly at that point prior to his purchase, and that a horse-railway line had been established in the center of the street, and that the line so established was being operated at that time and continued to be operated on the same grade, up to the bringing of this suit. This grade was nearly on a level with the surface of his lots. He states various acts of the city which induced him to believe that the grade of the street, at the time of his purchase, and at the time of erecting his buildings,

was the established grade of said street, at which it would be permanently maintained, and that so believing, he made his improvements accordingly. That about the month of April, 1882, which was after his buildings had been erected, the city compelled him to lay a stone sidewalk in front of said lots and buildings, on a grade about three feet below the natural surface of his lots, and about the same depth below a board sidewalk previously laid in front of his buildings. He further avers that said grade was much below the grade at which the street was then being maintained.

The plaintiff alleges that the excavation of this cut or grade rendered ingress from the street and sidewalk to his buildings and egress therefrom to the sidewalk and street, difficult. That it could only be effected by steps which he was compelled to erect, and that his property was rendered almost worthless for building purposes by this excavation; that the sidewalk was "laid so far below the rest of the street and the lots adjoining, that the drainage, wash and surface water, drift from the street and lots adjoining, runs and collects there, cutting off travel and emitting offensive odors, and the gems of disease, rendering the lots of the plaintiff unfit for use and less valuable for residence, and far less valuable for business purposes, and every other purpose."

He also alleges that the defendant did all these acts wantonly, causelessly and wrongfully, to the plaintiff's injury, and that the doing of said acts has damaged the plaintiff's lots and improvements in the sum of two thousand dollars.

The defense set up by the city, was that the grade of said street had been established by the city council several years before the plaintiff's purchase of the property, and that the grade so established has never been altered. That although the street at that point has never been excavated to the established grade, yet the sidewalk, the excavation of which is the subject matter of complaint, was laid to the established grade. That the grade so fixed was about three feet below the natural surface of the streets and sidewalks, of which facts the plaintiff had notice at the time of his purchase and the making of his improvements. Defendant denied that the property was rendered worthless or less valuable by this improvement, denied that the city did or caused any acts to be done wantonly, carelessly, unskilfully or wrongfully, and denied that the plaintiff was entitled to any damage or relief.

The character of the plaintiff's proof was to show how much his property was worth after the laying of the sidewalk than before it was laid, or in other words how much permanent damage he sustained by this excavation.

At the close of the plaintiff's testimony, defendant moved for non-suit, on the ground that the buildings for which damages were claimed had not been built on the established grade. The motion was denied and an exception saved.

On the part of the city it was proven that the grade of this street was established by the city council in 1875, and had never

been altered. That the sidewalk was, by the direction of the defendant, laid at this grade. That plaintiff had made no inquiry of the city officers, previous to making his improvements, or prior to his purchase, whether a grade had been established or not. It was also proven that at the time of making the plaintiff's improvements, the following city ordinance was in force, viz.:

"Before any person or persons shall commence the erection or construction of any building, upon the line of any street or public highway within the city of Denver, where the grade has been already established, he or they shall apply to the city engineer for the grade of said street, and thereupon it is made the duty of the city engineer to furnish to such person or persons the grade of such street or public highway; and if any person shall violate the provisions of this section, he shall, upon conviction, be fined not less than ten nor more than fifty dollars."

It is apparent from the record that the cause was tried by the court upon the theory that the lowering of the sidewalk to grade was a permanent injury to the plaintiff's lots and buildings, for which he was entitled to damages.

The conduct of the trial, and the character of the inquiries made of the witnesses, both by the plaintiff's counsel and by the court, show that the case was tried upon this view of the law.

This same theory is now relied upon to sustain the judgment. It is contended that any excavation of the street or sidewalk made after the plaintiff's purchase, and particularly after the making of his improvements, gave him a right of action for permanent injury thereto, within the meaning of the constitution and laws of this state, irrespective of the fact of the plaintiff's negligence in the premises.

The constitutional provision relied on is found in section 15 of article 2: "Private property shall not be taken or *damaged* for public or private use without just compensation."

Counsel go to the extent, as we understand him, of claiming that the excavating of a public street to any grade below the natural surface of the abutting lots, gives a right of action under the constitution, in all cases, to the proprietor of such property.

The provision above quoted is incorporated in the constitutions of several states, and numerous cases exist in which it has been construed, in most of which the constructions given are in harmony with each other. The legal effect of this provision was thoroughly considered by this court in the case of The City of Denver v. Bayer, Col., 113; 1 West Coast Rep., 505; and the cases bearing upon the question were reviewed in the opinion of the court written by Mr. Justice Helm.

It was there held that any interference with a street which permanently diminishes the value of the premises of a citizen, is as much a damage, under the constitutional provision, as though such damage was caused by a direct physicial injury thereto. But a distinction was drawn in respect to the character of claims made for

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The plaintiff alleges that the excavation of this cut or grade rendered ingress from the street and sidewalk to his buildings and egress therefrom to the sidewalk and street, difficult. That it could only be effected by steps which he was compelled to erect, and that his property was rendered almost worthless for building purposes by this excavation; that the sidewalk was "laid so far below the rest of the street and the lots adjoining, that the drainage, wash and surface water, drift from the street and lots adjoining, runs and collects there, cutting off travel and emitting offensive odors, and the gems of disease, rendering the lots of the plaintiff unfit for use and less valuable for residence, and far less valuable for business purposes, and every other purpose."

He also alleges that the defendant did all these acts wantonly, causelessly and wrongfully, to the plaintiff's injury, and that the doing of said acts has damaged the plaintiff's lots and improvements in the sum of two thousand dollars.

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At the close of the plaintiff's testimony, defendant moved for a non-suit, on the ground that the buildings for which damages were claimed had not been built on the established grade. The motion was denied and an exception saved.

On the part of the city it was proven that the grade of this street was established by the city council in 1875, and had never since

been altered. That the sidewalk was, by the direction of the defendant, laid at this grade. That plaintiff had made no inquiry of the city officers, previous to making his improvements, or prior to his purchase, whether a grade had been established or not. It was also proven that at the time of making the plaintiff's improvements, the following city ordinance was in force, viz.:

"Before any person or persons shall commence the erection or construction of any building, upon the line of any street or public highway within the city of Denver, where the grade has been already established, he or they shall apply to the city engineer for the grade of said street, and thereupon it is made the duty of the city engineer to furnish to such person or persons the grade of such street or public highway; and if any person shall violate the provisions of this section, he shall, upon conviction, be fined not less than ten nor more than fifty dollars."

It is apparent from the record that the cause was tried by the court upon the theory that the lowering of the sidewalk to grade was a permanent injury to the plaintiff's lots and buildings, for which he was entitled to damages.

The conduct of the trial, and the character of the inquiries made of the witnesses, both by the plaintiff's counsel and by the court, show that the case was tried upon this view of the law.

This same theory is now relied upon to sustain the judgment. It is contended that any excavation of the street or sidewalk made after the plaintiff's purchase, and particularly after the making of his improvements, gave him a right of action for permanent injury thereto, within the meaning of the constitution and laws of this state, irrespective of the fact of the plaintiff's negligence in the premises.

The constitutional provision relied on is found in section 15 of article 2: "Private property shall not be taken or *damaged* for public or private use without just compensation."

Counsel go to the extent, as we understand him, of claiming that the excavating of a public street to any grade below the natural surface of the abutting lots, gives a right of action under the constitution, in all cases, to the proprietor of such property.

The provision above quoted is incorporated in the constitutions of several states, and numerous cases exist in which it has been construed, in most of which the constructions given are in harmony with each other. The legal effect of this provision was thoroughly considered by this court in the case of The City of Denver v. Bayer, 7 Col., 113; 1 West Coast Rep., 505; and the cases bearing upon the question were reviewed in the opinion of the court written by Mr. Justice Helm.

It was there held that any interference with a street which permanently diminishes the value of the premises of a citizen, is as much a damage, under the constitutional provision, as though such damage was caused by a direct physicial injury thereto. But a distinction was drawn in respect to the character of claims made for

was the established grade of said street, at which it would be permanently maintained, and that so believing, he made his improvements accordingly. That about the month of April, 1882, which was after his buildings had been erected, the city compelled him to lay a stone sidewalk in front of said lots and buildings, on a grade about three feet below the natural surface of his lots, and about the same depth below a board sidewalk previously laid in front of his buildings. He further avers that said grade was much below the grade at which the street was then being maintained.

The plaintiff alleges that the excavation of this cut or grade rendered ingress from the street and sidewalk to his buildings and egress therefrom to the sidewalk and street, difficult. That it could only be effected by steps which he was compelled to erect, and that his property was rendered almost worthless for building purposes by this excavation; that the sidewalk was "laid so far below the rest of the street and the lots adjoining, that the drainage, wash and surface water, drift from the street and lots adjoining, runs and collects there, cutting off travel and emitting offensive odors, and the gems of disease, rendering the lots of the plaintiff unfit for use and less valuable for residence, and far less valuable for business purposes, and every other purpose."

He also alleges that the defendant did all these acts wantonly, causelessly and wrongfully, to the plaintiff's injury, and that the doing of said acts has damaged the plaintiff's lots and improvements in the sum of two thousand dollars.

The defense set up by the city, was that the grade of said street had been established by the city council several years before the plaintiff's purchase of the property, and that the grade so established had never been altered. That although the street at that point had never been excavated to the established grade, yet the sidewalk, the excavation of which is the subject matter of complaint, was laid on the established grade. That the grade so fixed was about three feet below the natural surface of the streets and sidewalks, of which facts the plaintiff had notice at the time of his purchase and the making of his improvements. Defendant denied that the property was rendered worthless or less valuable by this improvement; denied that the city did or caused any acts to be done wantonly, carelessly, unskilfully or wrongfully, and denied that the plaintiff was entitled to any damage or relief.

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damages, some affording a right of action under the law, while as to others no such right existed, the latter class coming within the maxim of *damnum absque injuria*.

By way of illustrating the views of the court in respect to damages for street improvements, it was said: "That our position might not be misunderstood, we have, at the risk of being charged with *obiter dictum*, suggested that, as at present advised, we think that for injuries caused by a reasonable change or improvement of the street, by the council, in a careful manner, the abutting owner should not recover." This is undoubtedly a correct legal proposition. It is open, of course, to construction as to its application to a given case.

The Illinois constitution contains the same provision in respect to damaging private property for public use as does our own. The case of Rigney v. City of Chicago, 102 Ill., 83, is the latest expression we have seen of the views of the supreme court of that state upon this subject. The court therein says: "While it is clear that the present constitution was intended to afford redress in a certain class of cases for which there was no remedy under the old constitution, yet we think it equally clear that it was not intended to reach every possible injury that might be occasioned by a public improvement." The lamented T. Lyle Dickey, then chief justice of that court, in a concurring opinion, expressed the following views upon this point: "It is not every change of a grade made in a street, which may in effect impair the value of the lot in its vicinity, which is a violation of the right of the proprietor thereof. Such changes in a street as it may reasonably be supposed might be made for the improvement of the public highway, the purchaser of a lot upon a street must be assumed to have consented to when the purchase was made. The making of such changes is, therefore, no invasion of his right in that regard."

The supreme court of California, also, in respect to a like constitutional provision, entertains substantially the same views that we do as to the proper construction of the provision. In Reardon v. City and County of San Francisco, 5 West Coast Reporter, 766, 767, the court say: "We are of opinion that the right assured to the owner by this provision of the constitution is not restricted to the case where he is entitled to recover as for a tort at common law. If he is consequently damaged by the work done, whether it is done carefully and with skill or not, he is still entitled to compensation for such damage under this provision. This provision was intended to assure compensation to the owner as well where the damage is directly inflicted, or inflicted by want of care and skill, as where the damages are consequential, and for which damages he had no right of recovery at the common law."

This is the view generally entertained by the courts, as to the effect of the constitutional provision under consideration. But it is not broad enough to cover every case of direct or consequential injury to property, as is shown by the exceptions almost invariably

inserted in the opinion of the courts. In the case last cited, the learned justice, Thornton, speaking for the court, says: "We do not intend to say, nor do we think it extends to such damages as the owner of the property injured sustains in common with the other abutters on the street, or the general public, but only to that special injury which he receives over and above such common injury." It is unnecessary to cite other cases. The cases above referred to contain abundant citations of authorities in support of the views above quoted.

It is clear, we think, that the general rule of decision giving damages to the owner of property abutting upon a public street, for injuries thereto caused by the making of a public improvement, does not apply to the case before us.

The elements of damages claimed here, clearly were, *first*, the fixing of the grade of the street three feet below the surface of the plaintiff's lots; *second*, the reducing of the sidewalk to that grade after the plaintiff's improvements had been made; *third*, the consequential injuries experienced by reason of the work itself, and the careless and wrongful manner in which it was done.

As previously stated, the basis of recovery claimed and allowed for the alleged injuries, was that of permanent injury to the property of the plaintiff. The inquiries both of his counsel and of the court, were as to the diminution in value of the premises, how much less was their market value after the grading than before.

It is unnecessary to consider the question, whether the establishing of such a grade, and carefully reducing the street thereto, would present such a case of injury to the abutting lot owners who had purchased property on the street and erected improvements thereon, *before* such grade was established, but with reference to an existing grade previously fixed by ordinance, and the street reduced thereto, for no such case was here made out.

The grade was fixed by the proper authorities long before the plaintiff's purchase of the property, although the street had not been lowered thereto. It was the plaintiff's duty to have inquired of the proper city officers, before his purchase, what the change was, when, if found objectionable for the purposes to which he desired to appropriate the property, he could have chosen a more eligible site. Especially was it his duty to have ascertained the grade before erecting his improvements. To say, in the face of the city ordinance above set out, that he was justified in relying upon certain acts and appearances, that the grade then existing was the fixed and permanent grade, is a proposition that cannot be entertained. He must be presumed to have known what this grade was when he erected his improvements, and to have built with reference thereto. The plea of ignorance of the fact, cannot, under the circumstances of this case, prejudice the municipality.

There is, therefore, in these elements of the claim prosecuted no such direct disturbance of rights enjoyed in connection with property, giving to it additional value, and which disturbance causes

special damage in excess of that shared by the public generally, as to authorize a recovery.

The only element of the plaintiff's claim upon which he is entitled to recover is, the unreasonable and careless manner in which the grading was done. The amount of damages thus sustained, however, was not proven, and, so far as the record shows, all proof relating to such damages seem to have been adduced in support of the proposition, that the premises were permanently diminished in value.

The city reduced the sidewalk in front of the plaintiff's premises to grade in the month of April, 1882, leaving the street so far above the established grade as to render the premises difficult of access, and the sidewalk so laid subject to overflow by water, etc.

The condition of the street and sidewalk continued up to the commencement of this suit, February 26, 1883, a period of about ten months.

It was the duty of the defendant to have reduced the street to the established grade at about the same time that it compelled the sidewalk to be so laid. For its failure so to do, it is liable for the actual damages sustained by the plaintiff during the interval between the excavating of the sidewalk and the lowering of the street to the same grade.

The judgment is reversed and the cause remanded for further proceedings.

LINN ET AL *v.* BUTLER ET AL.

October Term, 1885.

AGREEMENT FOR SALE OF MINE CONSTRUED—PAYMENT OF PURCHASE PRICE.—Plaintiff sold to the defendants a mining claim, under an agreement by the terms of which the purchase price was to be paid out of the net proceeds of the property sold; the agreement provided that if the vendees resold the property, the purchase price should at once become due and payable. The vendees subsequently entered into an arrangement the effect of which was to transfer to an adjoining mine owner a large portion of the property sold. *Held*, after a construction of the contract, that, upon such conveyance by the vendees, the purchase price became due and payable.

ERROR to the district court of Lake county. The opinion states the facts.

L. C. Rockwell, for the plaintiffs in error.

Decker & Yonley and *H. Butler*, for the defendants in error.

BECK, C. J. The litigation in this case arises out of mining transactions. Plaintiffs in error brought suit in the court below against the defendants in error, upon a contract of sale of an undivided one-fourth interest in the American mine. Defendants in error demurred to the complaint, alleging, as ground of demurrer, that it did not state facts sufficient to constitute a cause of action. The demurrer was sustained, and the plaintiffs declining to plead further, final judgment was rendered by the court, to which ruling and judgment plaintiffs duly excepted, and sued out this writ of error.

We learn from the complaint that Wm. P. Linn, one of the plaintiffs in error, owned an undivided one-fourth interest in the American mine, situated in California mining district, Lake county, this state, which interest he transferred and sold, January 24, 1879, to the defendants in error, Hugh Butler and Charles W. Wright, the consideration of the sale being five thousand seven hundred and fifty dollars.

The contract of sale, which is incorporated in the complaint, as a part of it, states the terms and conditions of payment, as follows: two hundred and fifty dollars cash (the receipt whereof is acknowledged); two hundred and fifty dollars in thirty days after date; two hundred and fifty dollars in sixty days after date; and the remaining five thousand dollars to be paid out of the net proceeds of the property sold.

The contract permits the purchasers to deduct from the proceeds of ore taken from the mine, on account of the one-fourth interest sold them, all legitimate mining expenses, together with the cash installments, amounting to seven hundred and fifty dollars, and the balance is to be deemed net proceeds. It was drafted in duplicate, and contains an agreement that it should not be assignable, and that the money agreed to be paid should become due and payable to Linn only. The purchasers were let into immediate possession, and, it is averred, that they waived the stipulation against the assignment of the contract soon afterwards, and consented to its assignment by Linn to Charles F. Burrill, as a security for a loan of money. Burrill afterwards assigned it to Linn's co-plaintiff in error, L. C. Rockwell, who now holds it as collateral security for money previously loaned by him to Linn.

Plaintiffs in error alleged that the purchasers, Butler and Wright, have disregarded the terms of sale specified in the contract, and have entered into such sales and transactions in respect to the property conveyed as to violate the terms of the sale, and seriously to impair the security of the purchase money.

The principal stipulations of the contract of sale, as set out in the complaint are as follows: "And it is further agreed, on the part of said second parties, that they will at the end of thirty (30) days next after the date hereof, pay unto said Linn, said sum of two hundred and fifty dollars ($250), and in thirty (30) days next thereafter a like sum; and that they will also pay unto said Linn, the remaining installment of five thousand dollars ($5,000), it being well understood, however, that said payment of five thousand dollars ($5,000), shall only be due and payable upon the terms and conditions herein; that is to say, that said latter sum shall be due and payable only out of the net proceeds received from the sale of ore taken from said American mine by said second parties, such net proceeds to be the net proceeds aforesaid of the undivided one-fourth interest of said mine, that being the interest conveyed by said Linn to said second parties. And it is hereby further agreed and fully understood, that the net proceeds above specified, shall be construed

only to mean, the money received by said second parties from the sale of ore mined and taken from said mine by them on account of said one-fourth interest, and left remaining in hand after paying all expenses of said mining, as well also all moneys advanced by said second parties, or paid out by them for and on account of said undivided one-fourth interest, including the seven hundred and fifty dollars ($750) paid on account of the purchase of said one-fourth interest. And in case of sale by said second parties of said interest, then, and in that event, said five thousand dollars shall at once become due and payable."

Upon a compliance with the terms of sale the purchasers had an opportunity of taking the entire purchase money out of the premises. True, three cash installments, of two hundred and fifty dollars each, were to be made, regardless of the proceeds of the mine; but provision was made for reimbursing the purchasers for these and other advances and expenditures. Hence, upon a final settlement, the entire consideration of the property sold would be five thousand dollars. It is evident from the tenor and effect of the stipulations, that Linn relied, for the consummation of the contract of sale, upon the mineral value of the property sold, and likewise, upon his knowledge of the honesty and mining experience of the vendees; likewise, upon their personal supervision and control of the workings of the American mine, to the extent of the interest conveyed to them by Linn.

The condition of the contract, that Linn should await final payment until the same could be realized out of the net proceeds of the property sold, means, the net proceeds of the entire interest conveyed, not the net proceeds from a fractional part of that interest.

The complaint avers that the vendees have not paid the said installment of five thousand dollars, and that they have entered into transactions which have destroyed the security for its payment, and that although it is now due and payable, they refuse to pay the same.

The transactions referred to, are, the sale of one-half the interest so conveyed to them by Linn, to the owners of the Little Sliver mine, and entering into an agreement with said parties to release an adverse claim, filed by the owners of the American mine against the application of said parties for a United States patent for the Little Sliver mine, whereby a large portion of the American mine was included, in the patent issued to the owners of the Little Sliver.

This result was brought about by the release of said adverse claim, and the dismissal of the suits brought in aid thereof, by Butler and Wright, and the other owners of the American mine, and without the knowledge or consent of plaintiffs in error. One purpose of this agreement was to effect a compromise of the litigation concerning the adverse claim, a dismissal of the suits pending, and consent of the owners of the American mine, that a patent might issue to the owners of the Little Sliver location without objection, for all

the territory claimed in their application, whether included within the patented surface ground of the American or not.

We cannot ascertain definitely from this agreement what proportion of the surface ground of the American was thus covered by the other claim, but find among the conceded facts therein the following specifications: "And whereas the territory included within the surface lines of said two mines conflicts as to the major portion thereof." It would seem to be a fair inference from this language, that a large portion of the American mine was in this manner voluntarily surrendered by Butler, Wright, and the other owners of the American mine, to those claiming the same under the name of the Little Sliver. It is alleged in the complaint that the owners of the Little Sliver were assisted by the owners of the American to obtain such a patent, and that the purpose of the latter owners was, that both mines might be consolidated into one, and that both might be operated conjointly under one general manager. The complaint alleges that all these agreements were carried into effect by or with the consent of the said Butler and Wright. The adverse claim was withdrawn, the suits dismissed, and a patent permitted to issue as proposed in the agreement. The two mining claims were consolidated into one, under a general manager who was operating the property at the time of bringing this suit. Under the agreement for consolidation, the owners of the American mine conveyed to the patentees of the Little Sliver thirty-nine seventy-seconds of that portion of the American mine which lay without the surface lines of the Little Sliver, and also outside the surface lines of the *Matchless* and the *Union Emma* mines. If *the territory included within the surface lines of the American and Little Sliver conflicted* "as to the major portion thereof," as alleged, the conflicting portion, of course, went into the patent of the Little Sliver. Then when thirty-nine seventy-seconds, or more than one-half of the portion *without* the lines of conflict, was conveyed to the owners of the Little Sliver, it would seem that but little of the title to the American lode proper remained in the former owners of the American, viz., Butler, Wright, Webster and Craig.

Here, then, was an absolute parting with one-half of the property sold defendants in error, a release to an adverse claimant of another portion, and a consolidation of the two mining claims into one, under a general manager of the whole.

Defendants in error received, in consideration of all these concessions on their part, nine seventy-seconds of the Little Sliver mine.

What now is the legal effect of these transactions upon the contract sued on? In our judgment the sale by Butler and Wright of a half interest in the property so conveyed to them, is of itself such an impairing of the security as to render the last installment of purchase money due and payable.

If a sale of one-half their interest does not produce this result, then no sale short of the whole interest would produce such a result, which conclusion is opposed to sound principles of construction.

The defendants in error have not only parted with a large portion of their interest, but have practically surrendered the management and control with which they were invested by the contract of sale. In addition to these acts, they have further impaired the security relied upon by plaintiffs in error, by entering into the agreement for consolidation of the two properties mentioned. No such merger of mines was contemplated, and certainly it was not contemplated that Linn should depend for the purchase money upon the net proceeds of a consolidated property, or two mines to be operated under a general manager, to be selected by the joint owners of both.

These facts and considerations afford good reason for the complaint that the defendants have voluntarily put themselves in a position whereby it is not only impossible for them to comply strictly with their contract with Linn, except by immediate payment in cash, but also impossible for Linn to enforce the contract otherwise than by declaring the five thousand dollar installment due and payable.

When the subject matter of the contract entered into between Linn and the defendants in error is considered; the condition of the title to the American mine at the time the contract was made; the men upon whose management, and the particular mine upon which he relied for full payment of the interest sold; when these and other facts stated in the complaint, such as the failure of defendants to pay, or even to render accounts of the operations contemplated by the contract of sale, and the inability of the plaintiffs to obtain any information concerning the indebtedness, it is our opinion that a good cause of action is stated. If the facts are otherwise than as stated, the court must be informed of them by an answer.

It seems clear, from an inspection of the contract itself, that the entire course pursued by defendants has been just the reverse of what was contemplated by the parties at the time of its execution.

Assuming the facts stated to be true, the defendants have forfeited their right to pay for the property purchased out of the net proceeds, and the purchase money is due and payable in cash.

Judgment reversed and cause remanded for further proceedings.

KIRKPATRICK *v.* WHEELER.

October Term, 1885.

APPEAL FROM ORDER—BILL OF EXCEPTIONS CANNOT CONTRADICT RECORD.—An order appealed from, is a part of the record; and to it alone can the supreme court look for information as to what was ordered by the lower court. Such order cannot be contradicted by anything contained in a bill of exceptions

THE SAME—UNDERTAKING MUST DESCRIBE ORDER.—An undertaking on an appeal from an order, which does not correctly describe the order, as it is incorporated in the record, is insufficient to perfect the appeal.

APPEAL from an order of the district court of Pitkin county. The opinion states the facts.

Patterson & Thomas, for the appellants.

E. O. Wolcott, for the appellee.

BY THE COURT. The order appealed from was made and entered of record by the court below, during the progress of proceedings in the case of Andrew Kirkpatrick, complainant, v. Archie C. Fiske, Porter Plumb, Henry Webber, Jerome B. Wheeler, Clinton Markell, S. M. Gillespie and A. W. Rucker, defendants.

The transcript before us shows that Kirkpatrick brought this action against the appellants to recover an interest which he claimed to own in the Emma mine, and also to recover his proportion of moneys alleged to have been realized by the defendants from the sales of ores taken from said mine.

The order appealed from, required one E. R. Holden, into whose hands moneys thus arising had come as receiver of the Emma mine, to deposit all such moneys in his hands in the Denver National Bank, subject to the further order of the court.

Jerome B. Wheeler, one of the above named defendants, appealed from this order, under the provisions of an act of the fifth general assembly, entitled "an act in relation to appeals to the supreme court, etc.," and attempted to make his appeal operate as a *supersedeas* so as to prevent Holden from making the deposit.

The record concerning this appeal has been filed in this court, and upon this record, we are asked to enter an order that these moneys be released, and that the district court pay over, or cause these moneys to be paid to the appellant, Wheeler, or to persons whom he may designate.

It will not be necessary for us to consider the legal effect of an appeal of this character, regularly taken under the act mentioned, since we must decline to grant the relief sought on other grounds, viz.: the irregularity of the appellate proceedings.

The order appealed from is a part of the record proper, and was duly entered therein by the clerk of the district court. To this entry alone can we look for information as to what was ordered by the court.

A bill of exceptions was prepared on behalf of Wheeler, and signed by the district judge, which purports to set out the same order, and it appears that the appellate proceeding is based, to a large extent upon the order as it appears therein. We find also that this order differs in some important particulars from the original order as entered of record by the clerk of the court.

It is a well settled principle of law, that what belongs to the record proper and is contained therein, cannot be contradicted by anything contained in a bill of exceptions. It is not the office of a bill of exceptions to set forth anything which ought to appear in the record proper, but on the contrary, its office is to preserve what would not otherwise appear of record. The record itself can never be qualified or varied by the bill of exceptions.

The original order required E. R. Holden to deposit in the Denver National Bank, all moneys then in his hands, which he had received as receiver of the Emma mine, to be retained and held by the bank subject to the order of the court. This order is general in its terms. It does not purport to be entered against any particular defendant, nor does it require that moneys claimed by a particular defendant only, shall be deposited. Neither does it command Holden to deposit a certain amount of money thus obtained and held by him. The order is, that *all money now in the hands of E. R. Holden*, which came into his hands as receiver of the Emma mine, be deposited in the bank.

As set out in the bill of exceptions, the order requires E. R. Holden, late receiver of the Emma mine, heretofore discharged, to deposit in the Denver National Bank, the sum of twelve thousand nine hundred and sixty-two dollars and twenty-one cents, money claimed by the defendant Wheeler, to be held subject to the further order of the court.

Holden may have had this sum of money and it may have been claimed by Wheeler, and he may have had other sums of money, claimed by others of the defendants, all of which came into his hands as receiver of the Emma mine. There is certainly an important variance between the two orders, and it is equally certain that the appeal, to be effective for any purpose must have been regularly taken and prosecuted from the original order.

The appeal bond recites that the court made an order against the defendant Wheeler, requiring the said Holden to deposit certain moneys in his hands belonging to said Wheeler, to wit, the sum of twelve thousand nine hundred and sixty-two dollars and twenty-one cents, in the Denver National Bank, and we are asked to enter an order that this sum of money be released and be paid over to said Wheeler, or to persons whom he may designate.

This undertaking does not correctly describe the order as incorporated in the record proper. Its conditions cannot be said to be based upon this order. We have no official information, therefore, that the only moneys in the hands of E. R. Holden, which had come to him and was being held by him as receiver of the mine, was the sum of twelve thousand nine hundred and sixty-two dollars and twenty-one cents, nor that this was the money of Mr. Wheeler. The object of the litigation, in part was to discover how much money had been realized from the working of the mine, and to whom it belonged.

Without considering the effect of an appeal regularly taken from the original order, we must deny this motion because of the irregularities stated.

D. & N. O. R. R. Co. *v.* LAMBORN ET AL.

October Term, 1885.

EMINENT DOMAIN—PETITIONER, WHEN MAY ABANDON—EFFECT OF POSSESSION PENDENTE LITE.—A petitioner, in eminent domain proceedings, loses the right of abandoning the same, whenever the land owner acquires a vested right to the compensation awarded. Under section 242 of the code of civil procedure this privilege of abandonment may be exercised at any time prior to the payment or deposit, in the manner provided, of the sum awarded. The petitioner, however, is liable for all legitimate expenses and injuries to the land owner occasioned by the proceedings. The right to abandon is not lost by reason of the petitioner's taking possession of the land, *pendente lite*, in the manner authorized by such section. Taking possession, under the statute, creates no contract between the petitioner and the land owner; consequently, an abandonment cannot impair the obligation of a contract.

THE SAME—ABANDONMENT PENDING APPEAL.—Under such statute, the party dissatisfied with the final determination of the court below, may appeal to the supreme court. By so doing, the petitioner does not waive or destroy his right to abandon; until such court has acted and confirmed the conclusions reached below, the amount of compensation for damages is not *finally* determined; and until then, the petitioner may abandon, although he has been in possession *pendente lite*.

THE SAME—PARTIAL ABANDONMENT—CONDEMNATION FOR RIGHT OF WAY.—Where the the petition sought the condemnation for a railroad depot, grounds, machine shop and right of way, the petitioner may, upon return of the award, if already in possession, retain and use the right of way, pending proceedings for its condemnation, and abandon as to the rest.

ERRORS ASSIGNED CONSIDERED and held that the award, and the order refusing to vacate it, should not be disturbed.

ERROR to the district court of Pueblo county. The opinion states the facts.

Wells, Smith & Macon, for the plaintiff in error.

John M. Waldron, for the defendants in error.

HELM, J. Counsel in this case elaborately and earnestly argued several important questions touching the rights and powers conferred by our law upon the subject of eminent domain. The graver of these questions will be briefly considered.

First. At what stage of condemnation proceedings, under our statute, does petitioner forfeit or lose the right of abandoning the same upon payment of all costs and damages actually accrued? It is, in our judgment, a correct answer that such privilege is lost, whenever the land owner acquires a vested right to the compensation awarded; but there is some diversity of opinion among the decisions, as to when this vested right accrues.

The statute declaring the procedure for ascertainment of damages and for returning a verdict or certificate of award, contains, *inter alia*, the following: "The court or judge upon such certificate or verdict of a jury, as hereinbefore provided, and due proof that such compensation and separate sums, if any be certified to be found, have been paid to the parties entitled to the same, or have been deposited to the credit of such parties, in court or with the clerk of the court, for that purpose, shall make and cause to be entered in its minutes, a rule describing such lands, a certified copy of which shall be recorded and indexed in the recorder's office of the proper county, in like manner, and with like effect, as if it were a deed of conveyance from the said owners and parties interested, to the proper parties. Upon entering of such rule, the said petitioner shall become seized in fee, except as hereinafter provided, of all such lands,

real estate, or claims described in said rule, as required to be taken as aforesaid, and may take possession of and hold and use the same for the purposes specified in said petition:" Sec. 242, code of civil procedure. The exceptions mentioned, in no way affect the question now under consideration.

The foregoing statutory provision indicates the exact moment when petitioner becomes entitled to the rule which operates as a conveyance to him of the fee of the premises and the right to possess, use, and enjoy the same. But, according to the conclusion reached in the better reasoned decisions, the rights of petitioner and respondent are reciprocal; respondent acquires no vested right to the compensation awarded until petitioner has secured a vested right to the property condemned, and *vice versa*. Accordingly it has been held, under statutes similar to ours in this respect, that the privilege of abandonment may be exercised at any time prior to the payment or deposit in the manner provided by law of the sum awarded: Stacey v. Vt. Central R. R. Co., 27 Vt., 39, and cases there cited: Peoria & R. I. Ry. Co. v. Rice, admr., 75 Ill., 329; Morris v. Mayor, 44 Md., 598; Graff v. Mayor of Baltimore, 10 Md., 544.

We think the forgoing conclusion eminently logical and adopt it. This does not, however, as we shall presently see, relieve petitioner from liability for all legitimate expenses and injuries to respondent occasioned by the proceedings.

Second. But it is ably contended by counsel for respondent that the foregoing can, in any event, only be considered good law in cases where petitioner has never had possession of the premises sought to be condemned; and that where, as in the case at bar, petitioner has secured and held possession pending condemnation proceedings, he cannot, after return of the award, abandon without consent of the land owner.

The statute, section 242 above mentioned, further provides that the court or judge may, at any stage of the proceedings, authorize petitioner to take possession of and use the premises, until the final conclusion of the adjudication, upon deposit in court or with the clerk of such sum as the court or judge may deem sufficient to pay the amount of damages ultimately awarded. We are not asked here to pass upon the constitutionality of this provision. Assuming with counsel, that the statute is not obnoxious to this objection, we have before us, simply, a question of statutory construction demanding for its answer a declaration of the legislative intent. And the second question suggested by respondents, may be restated as follows: Did the legislature intend to deprive a petitioner, who has taken advantage of the foregoing provision, of the privilege of abandonment from the moment the award or verdict is returned? There are no *words* in the statute expressly giving such an effect to the fact, and the inference must be drawn, if at all, from the general provisions, scope, and purposes of the act.

The argument, that ordinarily after verdict, it is too late for plaintiff to take a nonsuit, is scarcely pertinent to the question before us. This is a special proceeding, differing widely in its purposes from those of the ordinary civil action, and governed by dissimilar rules of pleading and practice. It is hardly appropriate to regard abandonment in one case, as analagous to nonsuit in the other. The principle stated in Pollard v. Moore, 51 N. H., 188, on this subject, we are unwilling to adopt as applicable under our statute, to cases of the kind before us. Petitioner desires the property or the right of way, as the case may be; but he does not desire it at an unreasonable and ruinous price. It may be that he is utterly unable to pay the exorbitant damages awarded, and would rather change his plans and build upon a new line, if the enterprise be a railway, or abandon the project altogether. It should be noted in passing, that the verdict of the jury or finding of commissioners that the premises described are necessary to the undertaking, is held not to bind petitioner to take those premises and none other; it is simply a declaration that, according to the surveys and plans disclosed in the petition and evidence, such taking is necessary. But petitioner cannot know before return of the verdict, that the price or damages allowed will be so excessive as to preclude adhering to the original plan adopted.

We are, therefore, of opinion that the return of the award or verdict does not mark a period in the case at which it is too late to draw back; further, we think that if it did, logically the same effect would be produced, whether possession pending the proceedings were obtained or not. Hence, if such possession operates to prevent abandonment, it should have this effect from the moment it is taken; that is to say, under the view urged by counsel for respondent, by electing to avail himself of the statute in this regard, petitioner should be held to forfeit the right to abandon at any time after obtaining possession in pursuance of such election, save upon consent of respondent.

We have assumed without argument, as above suggested, that the authority to take possession of, and use the property pending condemnation proceedings, by compliance with the statutory requirements, is not obnoxious to the constitutional inhibition against taking or damaging private property without just compensation to the owner; or against needlessly disturbing the same without payment or deposit of such compensation in court for the owner.

The expense of transferring his improvements, if any have been made on the premises, would, doubtless, have some influence with petitioner upon the question of abandonment; otherwise the fact of possession would in no way affect his reason for a change of plans; the awarding of excessive compensation, or the happening of some other important and unexpected circumstance, would be no less disastrous than if no possession had been obtained. The reasons, then, which influence petitioner, and which are held sufficient to justify abandonment in cases where possession has not been taken,

apply with equal force when the same has been obtained pending the adjudication.

How is it with respondent? Has he greater cause for complaint in the latter case than in the former? His occupancy and use of the premises are temporarily disturbed. But they are also disturbed to a less degree, by the temporary possession taken in running surveys, locating lines, and the like. For damages arising from the temporary disturbance now under consideration, the statute affords respondent ample security. Before availing himself of this privilege, petitioner is required to deposit an amount sufficient to recompense respondent for the injury thus inflicted. It is our opinion that the sum deposited is, in case of abandonment, security for all damages suffered by reason of the temporary occupation, as well as for the compensation awarded if the ownership pass to petitioner. If this conclusion could not legitimately be drawn from the language and purposes of the statute, we might be compelled to endorse the proposition, that by the act of taking possession thereunder, petitioner renounces his right of abandonment except with the owner's consent. For we are not prepared to hold this such a needful disturbance of property as to be allowable under the constitution without deposit of a sum to cover the damages occasioned.

It has been held that *municipal corporations* may discontinue and abandon condemnation proceedings, although possession has been taken and retained pending the same; and this, too, in cases where there does not appear to have existed any express statutory authority for such taking: 2 Dillon's Municipal Cor., 3d ed., sec. 609, and cases cited.

In view of the foregoing conclusions, we are disposed to hold that, under the law, petitioner retains the right to abandon, even though he procures a statutory order for possession, and takes the same pending proceedings. It is quite as important for him to have this privilege as if the possession had not been obtained, and respondent is fully protected. The latter may, within a reasonable time, have his action for all damages occasioned by the occupancy and use, and the sum deposited by petitioner is a security for the payment of such damages when ascertained.

It cannot be correctly claimed that the foregoing conclusion tends to impair the obligation of contracts. The right of temporary possession pending proceedings is an incidental privilege, wisely conferred upon grounds of public policy, by express statutory provisions. In accepting this privilege, petitioner acts without consent of respondent, and in direct opposition to the latter's wishes. There is wanting, therefore, the most essential element of a contract, either express or implied. This act of petitioner can, in our judgment, no more constitute the basis of a contract than does instituting the principal proceeding, and procuring therein an ascertainment and award of the compensation to be paid. Upon the latter subject, see Garrison v. The City, 21 Wallace, 196.

Third. Our statute authorizes a review of the proceedings by this court, either upon appeal or error, on application of the party dissatisfied with the "final determination" before a court or judge below. By procuring such review petitioner does not waive or destroy his right to abandon; until this court has acted and confirmed the conclusion reached below, the amount of compensation for damages is not *finally* determined; until that moment, therefore, petitioner is not apprised of the sum he must pay to obtain title to the property, and the alternative or *ultimatum* of payment or abandonment is not finally presented. The expression used in 6 Col., 340, that "the report of commissioners, and approval thereof by the court, in overruling a motion to vacate and set aside the same, fixes finally the price to be paid for the premises," means that such action is decisive of the question and final, *so far as that court is concerned.*

But, here again, the legislature carefully guard the interests of respondent and secure to him additional protection. While the right to such review is given *absolutely*, the *possession* pending appellate proceedings receives legislative attention. It is enacted that if petitioner desires to occupy and use the premises during such appellate proceedings, he must first deposit in court or with the clerk the amount of compensation ascertained and awarded: Section 250, code of civil procedure. A fair construction of this section, in view of the remaining provisions of the statute, is, we think, that if petitioner has obtained possession under the law at the inception of his proceedings, he must, in order to retain possession pending the review in this court, make the deposit equal in amount, if not already so, to the sum awarded as compensation. Failing to comply with the foregoing requirement, the appeal or writ of error, if taken by him, will not be dismissed, but his possession becomes unlawful, and respondent is entitled to relief upon proper proceedings therefor.

Fourth. Holding that petitioner in this case has had, and still has, the privilege of electing to abandon the condemnation proceedings altogether, a further question is presented. By its amended petition as finally amended, petitioner sought to procure the premises specified—being upwards of eleven acres—for its *depot grounds, machine shops* and right of way. After the overruling of its motion to vacate the award, it attempted to abandon all the premises, to the possession of which it was entitled under order of court, save the right of way alone, less than two acres. Its road bed had, in the meantime, been constructed over the land, thus appropriating the right of way, but no other actual possession of the premises had ever been taken, and any constructive possession thereof, if such a thing be possible in these proceedings, was fully abandoned by the erection of its depot buildings elsewhere, and by its express written declarations on the subject filed in the cause. But counsel for respondents argues that there can be no partial abandonment; that if petitioner could discontinue proceedings at all, it must be as to the whole of the

premises, or none; and, if we correctly understand him, he claims that petitioner should have abandoned the right of way and removed its ties and rails therefrom. As already observed, the proceeding was instituted for the condemnation of land for petitioner's depot grounds and machine shops, and also to secure the right of way for its road. Upon return of the award it substantially attempted, by a so-called supplemental petition, to abandon the whole proceeding. But it asked permission, under the law, section 242 aforesaid, to retain possession of the right of way, and requested the appointment of commissioners or selection of a jury to assess the compensation therefor. It might have been more regular had petitioner simply filed a statement relinquishing all claim to any part of the premises, and then, by a proper petition, have instituted an entirely new proceeding for the right of way. But we hardly think it was necessary to incur the useless expense and trouble of tearing up and removing its track only to replace the same when the court should have granted permission. The statute clothes the court or judge with authority to allow petitioner, *if already in possession* of the premises, to retain, and use the same pending proceedings, upon deposit of the sum fixed to cover the compensation afterwards awarded; this clearly implies that there may be instances where petitioner has possession before there has been any judicial action upon the subject. We think that in a case like the one at bar the court or judge might grant permission, making proper provision for security to retain possession during the proceedings.

Fifth. It is the impression of counsel for both parties that the writ of error in this case brings before us for review, only the proceedings prior to and including the order denying petitioner's motion to vacate the award. This action we have held to constitute, under the peculiar provisions of our statute on the subject of eminent domain, such a final judgment as laid the foundation for review on error: The D. & N. O. R. R. Co. v. Lamborn *et al.*, 6 Col., 340.

The assignments of error relating to the part of the record mentioned, are three in number; upon examination of the questions presented in connection therewith, we are of opinion that no ground for a reversal thereunder exists. That this conclusion agrees with the views of counsel, is evidenced by the fact that they do not rely upon those assignments in argument. The award of the commissioners in this case, and action of the court in declining to vacate the same, will, therefore, not be disturbed.

Sixth. It is needless for us to consider the apprehensions of counsel concerning the institution of experimental condemnation proceedings; and the wrong and annoyance which may be inflicted upon land owners through successive appraisements of the same premises by one and the same party. We do not recognize the right to such successive appraisements.

In this case should petitioner renew its election to relinquish all of the premises except the right of way, it would be manifestly unjust to compel respondent's acceptance of the value per acre fixed

in the award, for the two acres retained. In justice to respondents it is necessary that there should be a new appraisement both as to the value of the premises taken, and damages to their remaining lands, occasioned by the appropriation. This would be no second appraisement of the same premises, because there never has been a proper appraisement and award as to what is now asked. We fully recognize the fact that the interests of respondents in these proceeding should be carefully guarded; that the rights of the land owner are not to be trifled with. But if the foregoing views be correct, he is well protected. Besides the security above mentioned given by statute as a protection against damage or injury, it is enacted that if the proceedings be delayed by petitioner, the land owner may conduct the same to a conclusion. He is thus provided with the means for avoiding unnecessary delay. It may be further answered to counsel's suggestion that as petitioner must bear all the costs of the proceedings and also pay all damages arising therefrom, such experiments would be an expensive luxury; also that when cases arise wherein any of the abuses feared are not expressly provided for, the court will doubtless devise some means for giving the land owner ample protection.

The judgment is affirmed.

DARROW v. PEOPLE EX REL. NORRIS.

October Term, 1885

SUPERIOR COURTS—ACT ESTABLISHING IS VALID—SPECIAL LEGISLATION.—Chapter 103 of the general statutes, establishing a superior court in cities having a population of twenty-five thousand, although at present only applicable to the city of Denver, is not obnoxious to section 25, article v. of the constitution, prohibiting special legislation. Such court is neither a district court, nor a court of the same class or grade, and consequently is not violative of sections 14 and article vi. of the constitution. Its creation is authorized by section 1 of said article.

QUALIFICATION FOR OFFICE—LEGISLATURE MAY IMPOSE PROPERTY RESTRICTION.—The legislature may make the payment of taxes a necessary qualification for membership in the board of aldermen of a city. Section 6, article vii. of the constitution, providing that "no person except a qualified elector shall be elected or appointed to any civil or military office in the state," does not impliedly inhibit the addition of such property qualification.

QUO WARRANTO—JURISDICTION OF COURT WHEN ABROGATED—SOLE JURISDICTION CONFERRED ON BOARD.—The provisions of the amended charter of the city of Denver, that the legislative powers of the city shall be vested in a council, consisting of a board of aldermen and a board of supervisors, and that each board shall be the *sole* judge of the qualification, election and return of its own members," has the effect to deprive the courts of all jurisdiction to inquire, by *quo warranto*, into the right of office of a member of such councils, elected at the first election after the adoption of the charter.

ELECTION OF INELIGIBLE CANDIDATE—DE FACTO OFFICER—ACTS OF, VALID.—The election to an office, of one who is legally incapable of performing the duties thereof, is not an absolute nullity. If such person receives a majority of the legal votes cast, is declared by the proper canvassing board duly elected, is inducted into the office and proceeds with the performance of its duties, he is a *de facto* officer, until his disability is adjudged by a proper tribunal; and his acts performed in the discharge of his official duties are valid and binding. Upon ouster of such person, the candidate who received a minority of the legal votes polled, is not entitled to the office. In such case a vacancy is created.

QUO WARRANTO—FILING OF INFORMATION BY DISTRICT ATTORNEY.—The fact that the district attorney of the proper district subscribes and presents the information in *quo warranto* proceedings, implies that such officer has fully investigated the merits of the case, and that the proceeding, though on the relation of a private person, is instituted in good faith and upon sufficient grounds.

THE SAME—TAX PAYER HAS SPECIAL INTEREST.—One who is a tax payer has a sufficient special interest, to entitle him to present an information in a proceeding of *quo warranto*, to inquire into the right of office of a member of a board having authority to levy taxes.

APPEAL from the superior court of Denver. The opinion states the facts.

McCord, for the appellant.

Hankey, for the appellees.

HELM, J. The information in this case charges respondent with having wrongfully and unlawfully usurped and intruded into the office of alderman of the city of Denver. It is averred therein that at the time of his election and induction into office he was disqualified from holding that position or performing the duties thereof, by reason of his having paid no taxes in said city during the year previous. A general demurrer was filed to the information, which the superior court overruled, and respondent declining to plead, a judgment of ouster was duly pronounced. An appeal from this judgment brings the proceedings before us for review.

The record and the assignments of error present three important questions for adjudication.

The first of these questions attacks the legal existence of the superior court, upon constitutional grounds.

It is urged that the law, Chapter 103, general statutes, through which that court derives its existence, was designed for the city of Denver alone, and hence, is obnoxious to section 25, article v. of the constitution, prohibiting local or special legislation. Several cases are cited which, at first, may seem to support counsel's position; but in no instance is the statute which is held invalid, exactly similar in the particular mentioned to the act before us.

If this act were a clear and unequivocal attempt to evade the constitutional inhibition and create a superior court for one particular city, we would unhesitatingly accede to the views of counsel. Such legislation, although the purpose be disguised by the use of general language, is not to be tolerated.

But, construing all the provisions of the statute together, we cannot discover any such attempted evasion. Denver, it is true, is the only city to which the act at present applies. But the legislature clearly intended to provide for places that may hereafter acquire the population mentioned. The law is general, and is unlimited as to time in its operation. There is nothing unreasonable in the supposition that other towns and cities within the state will eventually contain twenty-five thousand inhabitants. Whenever this size is attained by such municipal corporations, the act becomes applicable thereto. This objection of counsel is, in our judgment, not well taken. Nor is their proposition that the statute is obnoxious to sections 14 and 28, article vi., of the constitution, any more tenable.

The superior court has no original criminal jurisdiction whatever; its authority is confined territorially to the corporate limits of the city in which it exists; it may entertain appeals from justices of the peace in cases relating to the violation of city ordinances. Hence it appears that, aside from its territorial limitations, the superior court is denied authority possessed by the district court

over a prominent and extensive branch of the law, while in an important class of cases it is given a jurisdiction withheld from the latter court. In these and other respects there is a radical difference between the two courts. The jurisdiction of the former is concurrent with that of the latter in so far as most of the matters upon which it may adjudicate are concerned; but the same is true of county courts as to civil cases not connected with the settlement of estates, where the debt sued for, or the value of the property involved, does not exceed two thousand dollars; yet it cannot be claimed that on this account alone these courts are of the same grade as the district court. The fact that procedure in the superior court is, in most respects, similar to that prescribed for district courts, has no special significance. Supposing the legislature had expressly enacted that procedure before the county court should, with certain specified exceptions, be the same as in the district court, would the county court thereby become a district court, or would it be contended that this made them courts of the same class within the meaning of the constitution?

In holding, as we do, that the superior court as created by the law now before us is not a district court, nor a court of the same class or grade, we answer the objections resting upon both of the constitutional provisions last above mentioned.

We think that the constitutional authority for creating courts in cities and incorporated towns as given by section one of said article is neither interpreted nor limited, as counsel seem to believe, by section twenty-six thereof, relating to police magistrates. And we hold that section one authorizes the establishment of the court in question.

The second objection presented for consideration, challenges the constitutionality of the statutory provision under which this proceeding was instituted. It is asserted that the legislature could not declare the payment of taxes a necessary qualification for membership in the board of aldermen. Counsel argue that section 6, article vii. of the constitution, which provides that "no person except a qualified elector shall be elected or appointed to any civil or military office in the state," by implication inhibits the legislature from adding the property qualification under consideration.

There is nothing in the constitution which expressly designates the qualifications of councilmen in a city or town; and this section contains the only language that can possibly be construed as applicable thereto. But it will be observed that the language used is negative in form; that it simply prohibits the election or appointment to office of one *not* a qualified elector. There is no conflict between it and the statute. By providing that a supervisor or an alderman shall be a taxpayer, the legislature does not declare that he need not be an elector. Nor is the provision at all unreasonable; on the contrary, it is a safeguard of the highest importance to property owners within the corporation. The right to vote and the right to hold office must not be confused; citizenship and the requisite

sex, age, and residence constitute the individual a legal voter; but other qualifications are absolutely essential to the efficient performance of the duties connected with almost every office. And, certainly, no doubtful implication should be favored for the purpose of denying the right to demand such additional qualifications as the nature of the particular office may reasonably require. We do not believe that the framers of the constitution, by this provision, intended to say that the right to vote should be the sole and exclusive test of the eligibility to all civil offices, except as otherwise provided in the instrument itself; that no additional qualifications should ever be demanded and no other disqualifications should be imposed. If, as has been well said, they "had intended to take away from the legislature the power to name disqualifications for office other than the one named in the constitution, it would not have been left to the very doubtful implication which is claimed from the provision under consideration:" State *ex rel.* v. Covington *et al.*, 29 Ohio State, 102.

The third and last question which we shall consider is, we think, fatal to the judgment below. The amended charter of Denver provides that the legislative power of the city shall be vested in a council, consisting of a board of aldermen and a board of supervisors. Section 3, article ii. of said charter, contains, *inter alia*, the following with reference to those bodies: "Each board shall be the *sole* judge of the qualifications, election and returns of its own members * * * ."

Appellant contends that this provision clothes the tribunal designated with exclusive authority to inquire into the qualifications of aldermen; that it deprives the courts of all jurisdiction in the premises.

The right of courts possessing general and original jurisdiction to inquire by *quo warranto* into the authority under which a person claims to exercise the privileges and perform the duties of an office is so well established that no doubtful language should be permitted to take it away. Accordingly, where the statute provides that the city council shall be the judge of the qualifications, election and returns of its own members, the power given is declared to be simply cumulative, and the concurrent jurisdiction of the courts is maintained. But, on the other hand, the doctrine is firmly established that if, in addition to the foregoing language, the word *sole*, or *exclusive*, or *final*, is used, the courts are thereby divested of all jurisdiction over the subject. It is said that when the legislature declares the council to be the sole judge of the qualifications, etc., of its own members, the intent is too clear to admit of doubt; the use of the word *sole* settles the question beyond a possibility of cavil, and there is no room for judicial construction.

The constitutional provision, section 1, article vi., which enacts that the judicial power of the state shall be vested in certain courts, in our opinion does not affect the foregoing conclusions. See

McCrary on Elections, sec. 295, and cases cited; 1 Dillon's Munic. Corp., 3d ed., secs. 202, 200, and cases cited.

The reason given for lodging this exclusive power with the city council is that the terms of office are usually short, and a proceeding through the courts is not sufficiently expeditious to meet the reasonable demands of the situation. But, as already intimated, there being no room for interpretation, we are not concerned with the reasons which may have operated upon the legislative mind in the premises. Whether the doctrine be wise or unwise, it is sufficient for us to say that *thus it is written;* if abuses should ever arise under the law, relief must be obtained by application to the legislature.

It is apparent that the foregoing conclusions are adverse to the claim of jurisdiction in the superior court to investigate the question of appellant's disability. It follows that we must hold the proceeding erroneous unless it appears that for some reason the statute under consideration does not affect this particular case.

To avoid the difficulty, counsel for the appellee contend:

First—That this being the first city council elected after the adoption of the law, and the statute providing that the vote for its members should be canvassed by the outgoing board in the manner prescribed by existing ordinance, it was evidently the legislative intent to except the first board from the operation of this statutory provision; and,

Second—They assert that, as the law requires the manner of making the canvass of votes cast for aldermen or supervisors to be prescribed by ordinance, the statutory provision under discussion is not self-enforcing; and since no such ordinance has been, or could have been, provided so as to affect the present council, it is inoperative, and the jurisdiction of the courts remains in so far as this case is concerned.

To both of these suggestions it must be answered that from the moment when the present council entered upon the discharge of its duties, the provision relating to the qualifications of its members, became operative; that in so far as this provision affects such qualifications it is continuous; and that the question of prior disability, like that of subsequent malconduct, may be investigated at any time during the term of office. It often happens that the particular fact which renders the party ineligible to hold a given position, is unknown to the public until long after his election and induction into office. It is even true that sometimes such disability is not discovered by the candidate himself until he has for a considerable period been performing his official duties. An obligation rests upon the council when the question is properly presented, to investigate the alleged disability and, if it be proven, to oust the incumbent though his term of office be about to expire. There is a marked difference between canvassing the vote and declaring the result of such canvass, and investigating a charge of prior disqualification which may afterwards be presented; while the present council cannot perform the

former duty, they are certainly in a position to discharge the latter. If any rules or regulations are essential to a proper investigation of alleged disqualifications of aldermen, the same may be supplied.

We can discover no satisfactory reason for holding that the unequivocal legislative expression concerning the qualifications of councilmen may not be given effect as to the case at bar. Conceding that an ordinance pointing out the method for canvassing the votes and declaring the election of supervisors and aldermen is necessary, this fact does not, in our judgment, affect the particular question of disability now under consideration; for while provision may be made for the investigation of such questions as this at the time the vote is canvassed, there must of necessity exist the right to make such inquiry at a period subsequent thereto.

To one of the arguments made, we reply that if the city council neglect or refuse at the proper time to pass an ordinance providing for the canvass of votes and the passage of such ordinance be a duty enjoined by law, the courts will have power by mandamus to compel that body to act. This, however, would be a very different proceeding from *quo warranto* to oust an incumbent on the ground of prior disability; the former would put in motion, *i. e.*, compel the council to act as the law directs; the latter would destroy the exclusive character of their jurisdiction to investigate the subjects named, and would thus be a clear violation of the statute.

We cannot agree with counsel in their assertion that where one is disabled from legally performing the duties of a public office, his election thereto is an absolute nullity. The better doctrine is that if such an one receives a majority of the legal votes cast, is declared by the proper canvassing board duly elected, is inducted into the office and proceeds with the performance of the duties existing in connection therewith, until the disability is adjudged by a proper tribunal, he is a *de facto* officer; and his acts performed in the discharge of his official duties are valid and binding. The rule established in this country by a strong preponderance of authority is that the votes cast for such persons are not to be entirely ignored; that his opponent who has received a *minority* of the legal votes polled shall not, upon ouster of the disabled candidate, be inducted into the office. In such cases a vacancy is to be declared and a new election ordered to fill the same: State v. Anderson, 1 N. J. Law R., 318; State *ex rel.* v. Smith, 14 Wis., 497; Saunders v. Haynes, 13 Cal., 145.

We have not discussed the objection that Norris is incompetent to act as relator in this proceeding.

Our statute on the subject, section 315 of the civil code, seems to have been complied with. The district attorney of the proper district subscribes to the information and presents the same; this fact implies that that officer has fully investigated the merits of the case and that the proceeding, though at the relation of a private party, is instituted upon sufficient grounds and in good faith.

If, however, such action of the district attorney were not conclusive, and if, under the statute, it were necessary that Norris should have some special interest in the matter, we still deem the information sufficient. It is therein averred that Norris is, and has been, for two years a freeholder and taxpayer in the city of Denver. Since the council have authority by law to levy taxes upon relator's property, he has surely a special interest in the character and composition of that body; an interest not possessed by hundreds of citizens and voters residing within the city. We would upon these grounds, if necessary, sustain his right to have presented the information, had the district attorney neglected or refused to act in the premises.

For reasons above given in discussing the third objection, we think the demurrer in this case should have been sustained.

The judgment of the court below is accordingly reversed.

THORNE *v.* ORNAUER.

October Term, 1885.

JUSTICES COURT—APPEAL—DISMISSAL—NOTICE OF MOTION.—On appeal from the justice's court, under section 389 of the civil code, notice of all motions set for hearing in the county court, must be given to the opposite party, by entering the same in the motion book, and a dismissal of an appeal on motion, of which no notice has been given, is erroneous.

THE SAME—APPLICATION FOR ORDER IS A MOTION.—An application for a rule commanding plaintiff to refund the docket fee, or, in default thereof, submit to a dismissal of his appeal, is an application for an order, and hence a motion.

THE SAME—WRITTEN PLEADINGS ARE NOT REQUIRED TO BE FILED in the county court, in appeals from the justice's court.

THE SAME—JURISDICTION OF JUSTICE SHOWN BY EVIDENCE ALIUNDE.—The failure of a justice to record in his docket the nature of the cause of action may be cured in the future proceedings by proofs *aliunde* establishing the justice's jurisdiction.

ERROR to the county court of Lake county. The opinion states the facts.

Haynes & Parks, for the plaintiff in error.

H. C. Dillon, for the defendant in error.

BY THE COURT. Upon perfection of the appeal from the judgment rendered by the justice, this cause was pending before the county court for a trial *de novo*. Thereafter the procedure was governed by the practice prescribed for the trial of causes in that court. As the law then stood, by section 389 of the civil code, notice of all motions set for hearing in that court, except those made during the progress of a trial, was required to be given the opposite party. This notice of motion made in *term time* was served by entering the same in a book kept for the purpose, called the motion book; the motion to be for hearing at the end of twenty-four hours after the record of such notice.

This statutory requirement was not complied with in the case at bar. The application for a rule commanding plaintiff to refund the

docket fee, or, in default thereof, submit to a dismissal of his appeal was an application for an order, and hence, it was a motion: Code, sec. 397, formerly 388.

No notice of this motion, either actual or constructive, by entry in the motion book according to law, was ever given. We must, therefore, hold that the court's action in dismissing the appeal and rendering a judgment for costs was erroneous.

Counsel's argument concerning the filing of written pleadings in such case is inapplicable. Written pleadings are only required to be filed in causes *originally begun* in courts of record; and while cases appealed from justices of the peace are pending for trial *de novo*, they are not governed by the code provisions relating to written pleadings; moreover, such pleadings are expressly dispensed with by statute: Section 1,987, general statutes. There is, in our judgment, no repeal, either express or implied, of the latter statutory provision.

It is not necessary for us to pass upon the other questions argued by counsel. It appears that the transcript from the justice does affirmatively show the *amount sued for*, and the defect from a failure to record in his docket *the nature of the cause of action* may be cured in the future proceedings by evidence *aliunde* establishing the justice's jurisdiction: Less v. Wilcoxson, 2 Col., 85.

The judgment will be reversed and the cause remanded for further proceedings.

HACKETT *v.* PEOPLE.

October Term, 1885.

MURDER—INSTRUCTIONS—RECOMMENDATION FOR MERCY.—In a prosecution for murder, the jury, after deliberating for a considerable length of time, came into court, and asked whether they could "endorse on the verdict a recommendation for mercy." The court answered in the affirmative, and, thereupon, a verdict of guilty was returned, with such recommendation endorsed. *Held*, that such instruction was error, as it must be presumed that the verdict would not have been agreed upon, except under the belief that the court had the power to mitigate the sentence.

THE EVIDENCE REVIEWED AND HELD TO SHOW THAT MANSLAUGHTER was the highest grade of crime for which a conviction could be sustained.

ERROR to the district court of Clear Creek county. The opinion states the facts.

Post & Coulter and *J. W. Mullahey*, for the plaintiff in error.

T. H. Thomas, attorney general, for the defendant in error.

HELM, J. Plaintiff in error was tried and convicted upon an indictment for murder. He is now, and has been for upwards of five and one-half years last past, in the penitentiary under a sentence of imprisonment for life. Several errors are assigned, but we deem it unnecessary to consider any, save two. The jury, after deliberating for a considerable length of time, and being brought into court at their own request, propounded the following question: "Can the

jury endorse on the verdict a recommendation for mercy?" To which question the court answered by a written instruction that they could endorse such recommendation upon their verdict should they desire so to do. Thereupon they retired, and soon after returned a verdict of guilty in manner and form as charged in the indictment. They also embraced in such verdict the following: "We, the jury, recommend the defendant to the mercy of the court."

Thus, it appears, that some of the jurors were opposed to a conviction for the grade of crime finally found in their verdict; and that they only consented thereto upon condition that the recommendation for mercy be incorporated. They must have been led to suppose, from the court's answer to their question, that this might have weight in mitigating the severity of the sentence to be pronounced. Any other explanation of the proceedings would be absurd. And it must be assumed that, without such belief, the verdict, as returned, would not have been agreed upon.

Yet, as the law then stood, the court was powerless to heed their suggestion. Upon a verdict in this form, it was his duty to pronounce a sentence of imprisonment for life. The law fixed the penalty, and he could not subtract a single day. He must either set the verdict aside and order a new trial, or enter the judgment fixed by the statute. The instruction mentioned was, therefore, clearly misleading, and, under the circumstances, a fatal error.

But we reverse the judgment in this case willingly for another reason.

Surprising as the fact may be, it is nevertheless true, that the verdict was not warranted by the evidence; in the light of all the testimony contained in the abstract before us, manslaughter is certainly the highest grade of crime for which the accused ought to have been convicted.

He asserts that the shooting was purely accidental; one witness testifies that before death deceased declared to him that the shooting "was all an accident;" a witness for the state says that deceased used the following language after receiving the fatal wound: "Do try to take Pat (meaning Hackett) away from me out of the cabin. Tell him I said it was an accident." But, discarding entirely the accident theory, the evidence, at most, sustains only the conclusion that the fatal shot was fired in a sudden heat of passion, during a drunken brawl between companions; deceased having first choked Hackett, thrown him on the bed, and otherwise maltreated him. It is deemed unnecessary to give a description of the affray at length.

The judgment is reversed and the cause remanded.

YATES *v.* HURD.

October Term, 1885.

NOTICE—POSSESSION AS NOTICE OF PRIOR RIGHTS.—The open, notorious and exclusive possession of land, under an apparent claim of ownership, is notice to subsequent purchasers, of whatever interest the one in possession has to the premises, whether such interest be legal or equitable in its nature.

THE SAME—DUTY OF POSSESSOR TO DISCLOSE TITLE TO SUBSEQUENT PURCHASER.—But a party so in possession, under a contract for the sale of the premises, cannot, when interrogated by a would be purchaser, concerning his claim or right, either expressly misrepresent or tacitly suppress any material fact, whereby the latter is misled, without suffering the consequences. These consequences are that he is estopped from afterwards asserting the claim or equity which he ought to have disclosed, but did not, as against the title of the purchaser whom he deceived or misled.

THE SAME—ESTOPPEL BY ELECTION—CASE IN JUDGMENT.—A grantee of land, in an action by the grantor to recover on notes given for the purchase price, set up a partial failure of consideration, resulting from the fact that such land was in the possession of another, claiming an equitable title to the same under a prior contract of sale from such grantor. Judgment was rendered in favor of the grantor, and the grantee was compelled to pay the notes. *Held*, that the assertion of such defense did not afterwards estop the grantee from disputing the equitable title of the vendee under such contract of sale.

ERROR to the district court of Clear Creek county. The opinion states the facts.

R. S. Morrison, for the plaintiff in error.

L. C. Rockwell and *W. T. Hughes*, for the defendant in error.

HELM, J. Ejectment by defendant in error; contest over half of a certain lot in Georgetown. Both parties claim through one Smith, who is, therefore, a common source of title. Hurd holds by warranty deed from Smith; Yates relies upon possession and an unrecorded written agreement from Smith promising to sell. Yates was, at the time of Hurd's purchase, and had been for three years prior thereto, in the visible and exclusive possession of the premises. This fact gives rise to the principal question in the case, viz.: Did such possession of Yates operate as a notice to Hurd and thus render the latter's purchase subject to the former's equitable rights in the property?

We shall assume, without discussion, that these equities of Yates were such as to entitle him to a deed from Smith to the land in controversy. This assumption is probably correct; for, in the first place, the agreement was in writing, signed by Smith, and, secondly, it had been executed on the part of Yates by payment of the purchase price.

The general rule is, "that open, notorious and exclusive possession of real estate under an apparent claim of ownership, is notice to those who subsequently deal with the title of whatever interest the one in possession has in the fee, whether such interest be legal or equitable in its nature:" Wade on the Law of Notice, section 273, and cases cited.

But the theory upon which the foregoing doctrine rests is that such possession is sufficient to put the purchaser upon inquiry, and thus lead to a disclosure of the true state of the title. Resulting from this, as might be expected, is an equitable principle which forbids the occupant, when interrogated concerning his claim, or

rights, to deceive or mislead the would-be purchaser. It is the former's duty to disclose the whole truth, and if he does not do so, but, on the contrary, either expressly misrepresents the situation, or tacitly suppresses some material fact and thus misleads the latter, he suffers the consequences. Those consequences are that he is estopped from afterwards asserting the claim or equity which he ought to have disclosed, but did not, as against the title of the purchaser whom he deceived or misled.

"In cases involving the title to real estate, the doctrine of estoppel by conduct rests upon the broad principle of equity, that one who encourages by representations, or even stands by and sanctions the acquisition of land by another, will be estopped to defeat the purchase by afterwards asserting title in himself:" Patterson v. Hitchcock, 3 Col., 533.

Before purchasing, Hurd made an effort to learn the nature of Yates' interest in the property. Concerning the result of this effort there is conflict of the evidence.

Hurd himself testifies that he examined the records of the town and county and found nothing showing title or claim of title in Yates; that Smith, the vendor, told him Yates occupied under a verbal lease at fifty dollars per annum; that upon inquiry Yates informed him "that he held the property by possession, and proposed to hold it in that way;" that he had no notice or knowledge whatever of a writing between Yates and Smith until September, about two months subsequent to his purchase, when Yates, for the first time, disclosed the fact that he had a written contract of sale from Smith; that when on the same day he informed Smith of Yates' statement, the former declared that if Yates had anything of the kind it was a forgery, for he never gave him any paper except a receipt for rent.

William J. Hurd, brother of defendant in error, testified that *he* first began negotiations looking to the purchase of two lots, including the ground in controversy, for himself and defendant in error, the latter being absent at the time; that he searched the records and found nothing showing an interest in Yates; that Smith informed him that Yates held under a lease; that he approached Yates and the latter said, as witness remembered, that he had a deed from Smith, or was to get one from the city; that he asked permission to see the paper, but inspection was refused; that Yates said: "This is my property, and I will not show you the paper;" that negotiations for the purchase fell through, and he had nothing more to do with the matter; that he was not acting as agent for his brother, and was not prepared to state that he communicated to his brother his interview with Yates, but his impression was to the contrary.

On the other hand, Yates testified that William Hurd inquired about his title; that he told him he had a paper showing ownership; that William asked to see the paper; that he refused, but offered to show it to defendant in error; that two or three days afterward he talked with the latter and told him he owned the

premises and had the papers to show for them; that upon request he let Hurd copy the paper in his presence; that this was in June, Hurd's purchase being in July following; that after Hurd examined the paper he said it amounted to nothing, and he could beat him at law.

Smith, testifying for Yates, said at the time of sale to Hurd, he told him he had given Yates the privilege of using the ground and that he had leased as he supposed at fifty dollars a year rent; but there was a writing between him and Yates, the contents of which he did not know; that Hurd got a copy of this writing and showed it to him and that he then said if Yates could construe the writing into a sale, he might do so; that he signed the paper supposing it to be a lease; that about two weeks thereafter, Hurd said he was satisfied that Yates had no title and bought the property; that he told Yates, after signing the deed to Hurd, he, Yates, would have to go off the premises. On behalf of Hurd, in rebuttal, W. T. Hughs, his attorney, testified that in the fore part of September, Smith, in his office, denounced the agreement between himself and Yates as a forgery. Two witnesses, Pratt and Eldridge, testified by deposition, that on September 3, they were in Hurd's office, there being present also, Hughs, Smith and Yates; that Yates claimed that he had a contract with Smith for the property in dispute; that Hurd seemed very much surprised and questioned Smith about it; that the latter denied the existence thereof; that Yates went out to get the paper, and during his absence Smith said if he had any such paper, it was a forgery, as he had only rented the ground, and the only paper Yates could have, was a receipt for rent; that Yates returned with the paper and Smith, after inspection thereof, said he must have signed it thinking it a receipt for rent; Pratt testified that Hurd then copied the paper; Eldridge did not see him copy the paper.

Yates' own testimony shows that the Hurds informed him of their negotiations for the purchase of the premises at the time of their conversations with him in May and June.

From the foregoing evidence it appears beyond dispute that Hurd put forth all reasonable endeavors to discover the foundation of Yates' claim or interest. And, if Hurd's testimony is believed, he must, in law, take the title discharged of the secret equity existing in connection therewith. For at the date of purchase, he had no actual knowledge of the unrecorded contract, and the declarations of Yates himself, justified the conclusion that the latter relied solely upon his possession; while, according to Smith, Yates' occupancy rested exclusively upon a verbal lease or license.

The material question upon which most conflict exists in the testimony, is, of course, as to when Hurd first became apprised of the existence of the contract between Yates and Smith; upon this question, the court below must have found with Hurd; and such finding is, we think, fully warranted. His statement that it was subsequent to the purchase, is substantially corroborated by the testimony of

Pratt and Eldridge; while Smith's declaration on the subject, is further contradicted by Hughs; for if Smith had informed Hurd of the writing before the purchase, as he contends he did, he would hardly afterwards, in Hughs' office, have proclaimed it a forgery.

Yates appears to have been honest in his claim of ownership and he was certainly injured by the transaction. But the fault is largely his own. He should have recorded his contract, or, having failed to do that, it was his duty, when questioned by one contemplating a purchase, to have fully and unreservedly disclosed the whole truth. This, according to the weight of evidence, he did not do; on the contrary, he seems to have regarded the inquiries of the Hurds as impertinent and not entitled to serious consideration.

It is not necessary for us to pass upon the further proposition urged by the counsel for defendant in error, viz.: That "possession, taken or held by virtue of one right, is not notice of another right which the occupant acquires subsequently, unless it is attended by some change sufficiently visible and notorious to put purchasers on their guard."

Counsel for plaintiff in error, urge strenuously but one other matter as constituting sufficient ground for a reversal. It appears that after the trial of this cause by the county court, decree therein in favor of Yates and an appeal to the district court, Smith brought suit against Hurd upon certain promissory notes given as part payment of the purchase price for two lots, including the disputed ground. As a partial failure of consideration, Hurd pleaded the existence of this controversy concerning the title to the premises in question; he also pleaded the fact that a decree in favor of Yates had been entered herein by the county court. The court below sustained a demurrer to this branch of the defense and Smith obtained his judgment for the full amount of the notes; this court, on appeal, afterwards affirmed that judgment: Hurd *et al.* v. Smith, 5 Col., 233.

Counsel assert that, by entering that plea in the suit upon the notes, Hurd became estopped from further prosecuting the case at bar. In support of their assertion, they rely upon the doctrine of estoppel by *election* or *inconsistent positions*. This is a subdivision of the general subject of *estoppel in pais*. The latter has been defined to be "an indisputable admission, arising from circumstances that the party claiming the benefit of it has, while acting in good faith, been induced, by the voluntary and intelligent action of the party against whom it is alleged, to change his position:" Bigelow on Estoppel, 345.

With reference to the subject of election, Mr. Bigelow has this also to say: "Whenever *the rights of other parties have intervened* by reason of a man's conduct or acquiescence in a state of things about which he had an election, and his conduct or acquiescence, or even laches, was based upon a knowledge of the facts, he will be deemed to have made an effectual election, and will not be permitted to disturb the state of things, whatever may have been his rights at first:" Id., 508.

The case relied on most strongly by counsel, and from which they have quoted most freely, is Bailey v. Bailey, 44 Pa. St., 274. Examination thereof shows that Mrs. Bailey asserted a right under a decree of divorce, and *upon the strength of that assertion recovered a judgment in replevin against her former husband;* the court held that she could not afterwards be permitted to reverse the decree of divorce; but the opinion clearly shows that it was not merely her plea of matter arising by virtue of the decree that produced the estoppel. Had the court, in the replevin suit, refused to recognize her right and ignored the decree, that action would probably not have influenced appellate proceedings in the divorce case.

A careful examination of the foregoing definitions and of numerous illustrations, discloses the fact that to constitute this sort of estoppel, the act of the party against whom the estoppel is sought, must have gained some advantage for himself or produced some disadvantage to another; the person invoking the estoppel must have been induced "to change his position," or by reason thereof, "the rights of other parties (must) have intervened."

It will be observed that in this regard estoppel by election, *i. e.*, by choosing between inconsistent courses of conduct, is very similar to estoppel by conduct, or equitable estoppel; for to constitute the latter, the party complaining "must have been induced to act" by the representation or concealment of material facts: Griffeth v. Wright, 6 Col., 248.

And this similarity is essential because the latter, like the former, is a branch of estoppel *in pais*. See Bigelow on Estoppel. And as indicated by the general definition above given, the complaining party, whether the act be claimed to constitute an estoppel by election or an equitable estoppel, must have been led thereby to change his position. It may be remarked, in passing, that Mr. Hermann in his work on the law of estoppel treats estoppel by election as a branch of the subject of equitable estoppel.

Applying these tests to the case at bar, it will be found that the principle of estoppel cannot be here invoked. Hurd's attempted defense of partial failure of consideration was of no avail; it was solemnly and finally adjudged upon demurrer that the matters thus pleaded by him constituted no defense to the notes, and he was compelled to pay them in full. By this act he obtained no benefit or advantage, nor can it be said that by reason thereof the rights of third persons in any way intervened or that Yates was thereby induced to change his position. The attitude and rights of all parties remained precisely the same as they were before the plea was interposed. Had that plea been successful, this case would have been more analagous to those cited by counsel; for it might then perhaps be said that, having secured an advantage by reliance upon the decree in favor of Yates, he should not afterwards be allowed to attack it. The opinion in Smith v. Hurd, *ante*, shows that the court there did not view the decree of the county court in this action as final; for this cause being still undetermined is one of the

reasons there assigned for holding the defense insufficient. And to accept the position now urged by counsel for plaintiff in error, would be to tell Hurd substantially: you appealed from the decree in ejectment, therefore, you shall not have any deduction from the purchase price of the land; but since you saw fit to plead that decree as a partial failure of consideration in the suit for such purchase price, you shall not be permitted to further prosecute this cause. That is to say: you must pay your note though it was not negotiated, and you received no consideration for it. A conclusion that hardly comports with advanced ideas on the subject of impartial justice.

The judgment is affirmed.

DENVER AND RIO GRANDE RY. CO. v. CHANDLER.

October Term, 1885.

STRAYED ANIMAL—DAMAGE TO, BY FALLING THROUGH RAILROAD BRIDGE.—The owner of a horse turned it loose in the evening, in the morning it was found by the servants of the appellant, upon one of the railroad bridges on its track, where the animal had broken a leg by slipping it down between the bridge timbers. The appellant's servants extricated the horse, and then killed it. The evidence showed that the horse was valueless when killed. *Held*, that the company was not liable for the damage to the horse, as it was under no duty to the owner to keep its bridge inclosed, and that the killing of the horse, after the accident, was an act of humanity.

APPEAL from the county court of Conejos county. The opinion states the facts.

John C. Waldron and *C. C. Holbrook*, for the appellant.

STONE, J. With the exception of the overruling of the motion for nonsuit, we do not think the appellant was prejudiced by the several rulings of the court excepted to in the course of the trial, and assigned for error here.

The action was brought by appellee Chandler against the appellant railway company, to recover the value of a horse injured by going upon a railroad bridge, and thereafter killed by the employees of the said company.

The testimony as set out in the record is in substance, as follows:

The appellee Chandler testified: "I am the plaintiff in this case; on the first day of July, 1882, about eight o'clock in the morning, I went for my team, and one of my horses was missing, I had turned him out of the stable the evening before; I started out to look for my horse, and I saw the engine backing out pulling my horse off the bridge which crosses the San Antonio river. The horse's fore leg was broken. The engineer shot the horse in the head with a thirty-two calibre pistol; another one of the train men struck him in the head with an iron bar. They then run the train back to Antonito and got a Winchester rifle and came back and shot the horse and killed him. The first I saw of the horse, they had a

chain around him drawing him off the bridge. He was a brown horse, eight years old, and was worth one hundred and twenty-five dollars. He was my horse. I am some acquainted with the general value of horses. This occurred in Conejos county, Colorado. I told them that if the horse was worth anything I didn't want him killed. I turned the horse out of the stable the evening before. When I first saw the horse that morning, his fore leg was broken at the joint. I don't know whether it was broken or unjointed; the bone came through the skin. I don't know as the horse was worth anything then. My stable that I turned him out of the evening before is one mile from that bridge. I don't know how long the horse had been on the bridge. That was the first that I saw of the horse after I turned him out. I live in Antonito."

Witness Tozer testified as to the value of the horse a couple of months previous to the killing.

W. F. Moyer, on behalf of plaintiff below, testified as follows:

"On the first of July last, I was section foreman. Soon after the passenger train started for Espanola, I started out. The train was near the bridge stopped. They wanted a rope to pull the horse out of the bridge, and I went after one. Mr. Bigelow, one of the train men, shot the horse. They backed the train back to Antonito to get a gun to kill the horse with. I saw the engine backing from the bridge when they pulled the horse out. His leg was broken when they shot him. I knew the horse before he was killed. I have handled horses a little. He was worth one hundred and twenty-five dollars. I had him appraised. The horse's leg was broken at the joint. He had got on the bridge the night before, sometime in the night. I was not there when the horse was first found on the bridge."

At the close of this, the evidence for plaintiff below, the defendant moved for nonsuit, which was overruled by the court.

The following testimony was then heard on the part of the defendant company.

L. H. Weed testified: "I live at Alamosa. I am conductor of the Denver and Rio Grande railway. I was conductor on the train that left Antonito for Espanola, on the first day of July, 1882. We left about eight o'clock, A. M. The bridge over the San Antonio river is about one mile from Antonito. The train began to slack about fifty rods before we got to the bridge, when within twenty or thirty yards of the bridge, it came to a standstill. I saw a horse fast in the bridge. We left the train and went to the bridge, and found the horse fast in the bridge, with one fore-leg broken. When we found the horse in the bridge, he was not worth anything. We tried to get him out. The train could not pass unless we got him out. We first tried to pry him out with a plank; then we tried to saw him out, and tried to chop him out. We tried to get him out without injuring him any more than he was when we found him, and we exercised all the care and caution and diligence in the matter that we could possibly do. No men could have done more, if it had been their own property. When we couldn't get the horse out of

the bridge any other way, we brought the engine up and put a chain around the horse's neck and pulled him out of the bridge with the engine. There were several men there, and all agreed that the horse was worthless and must be killed. The plaintiff was one of the men who was there. He made no objection to the killing. We then killed the horse. I don't know how long the horse had been in the bridge. The train did not get nearer than twenty yards of the bridge. The bridge is about sixty feet long. The horse was out on the bridge, about fifteen feet from the end of the bridge. The ties on the bridge are close together; I suppose about five or six inches apart. After we had drawn the horse out of the bridge with the engine, the engineer hit him on the head with a hammer; then I shot him with a twenty-two calibre pistol. This not killing him, we ran the train back to Antonito and got a Winchester and returned and killed the horse with it. The horse's leg was broken when we found him in the bridge, and when we undertook to help him out, he commenced to flounder, and the bone came through the skin."

Thomas Murphy testifies as follows, to wit: "I reside at Alamosa. I am roadmaster on the Denver & Rio Grande Railway, between Antonito and Espanola, I held the same position on the first day of July, 1882. We started out from Antonito with the train for Espanola, at about 8 o'clock in the morning, on July 1, 1882, and when we got in about two hundred yards of the bridge across San Antonio creek, the train began slacking, and when about twenty-five or thirty yards from the bridge, came to a standstill. When the train stopped, I was out walking to see what was the matter. I saw the horse when about forty yards from the bridge. Mr. Weed and myself and the engineer and some others left the train and went up to the bridge and found the horse fast in the bridge with one fore-leg broken. We tried to pry him out with a plank, we then tried to saw him out, and to chop him out with an axe, but he floundered so that we couldn't chop or saw. We tried to roll him out on a plank, but being unable to get him out otherwise, we put a chain around his neck and brought up the engine and pulled him out that way. The plaintiff and others were present then. It was said by all that the horse was valueless and that he would have to be killed. The plaintiff said the horse was worth nothing to him. The horse was worth nothing when we found him. We exercised all the caution, care and diligence in trying to extricate the horse from the bridge, that any men could have done. The horse may have been in the bridge all night and he may have been there not more than two hours. I was roadmaster, and was on the train at the time. It was customary, and is still the custom on the road to slacken the train, but not customary to whistle in a case like that. The engine did not whistle. Mr. Parker was engineer. He is out of the employ of the company, and resides, I believe, down here at Antonito. I will be positive that no alarm was given. I gave the section foreman orders to bury the horse and also to have him appraised. I have orders to have all dead stock on the line of the road buried and to report the

same. I think Mr. Bigelow shot the horse. I could not see at first, but saw afterward, that the bone was broken. I don't think the leg was broken after we went there. The reason I thought his leg was broken was that it was bent double. The bone came through after we tried to get him out."

Upon the foregoing evidence, the court, to whom the case was tried without a jury, found for plaintiff, and adjudged his damages at eighty-five dollars.

The only question we need consider is, whether the state of facts disclosed by this testimony warrant the judgment.

To entitle the appellee to recover, there must have been a liability cast upon the appellant, arising either *ex contractu* or *ex delicto*.

This suit was first brought in a justice's court, and from that appealed to the county court, and so was tried without written or formal pleadings, but it is not pretended that the railway company was liable upon any obligation arising out of contract. To constitute a liability founded upon the fault of the company, it must have been established that there existed a duty on the part of the appellant company, the failure to perform which occasioned the loss of the horse. The only duty in this case that can possibly be supposed is that the company should have prevented the animal from going upon the bridge where he was injured. But there was no law which imposed such duty upon the company; neither by fencing nor by any other means. The horse had strayed away in the night time a mile from where he was turned loose by the owner, and was found by servants of the company upon one of the bridges on its track, a bridge adapted only for the purposes of railway transportation, and where the animal had broken a leg by slipping it down between the bridge timbers. To extricate the animal from the bridge was a necessity to appellant; to kill it was an act of humanity, and by such killing the owner suffered no greater or further injury or loss than the previous accidental breaking of the horse's leg which rendered it wholly valueless. There is no dispute as to the facts; the owner was himself present when the horse was extricated and killed, and the only question for us to determine is one of legal liability on the part of the appellant.

We do not hesitate to say that there was no such liability. The appellee turned his horse loose upon the common at his peril. The appellant was entitled to his nonsuit, but since a new trial could not, upon the undisputed facts of the case, have presented a different cause of action, or worked a different result, we must reverse the judgment for error in the court in awarding it when there is nothing in the case to support it.

Judgment reversed and cause remanded with direction to dismiss the complaint.

BLAIR ET AL. v. BRUNS.

October Term, 1885.

DEED—UNCERTAINTY OF DESCRIPTION—EVIDENCE TO IDENTIFY LAND.—A deed, which describes the property conveyed as "all the right, title, interest and demand which the grantor has, or ought to have, in and to all those lots and parcels of land lying in the town of Silverton, which remained undivided amongst the proprietors of said town site upon delivery of deeds by the trustee, of said town site, to the said proprietors, the same being one-twelfth undivided interest in said undivided lots," is not void for uncertainty of description. And parol evidence is admissible for the purpose of identifying the property intended to be conveyed.

THE SAME—ADMISSION IN ANSWER DISPENSES WITH PROOF.—Where the answer admits the identity of certain land with that described in a particular conveyance, evidence to prove such fact is unnecessary; and the admission of incompetent evidence for such purpose is not error.

APPEAL from the district court of San Juan county. The opinion states the facts.

John G. Taylor and *S. P. Rose*, for the appellants.

H. O. Montague, for the appellee.

HELM, J. October 22, 1877, Caulder, being the equitable owner through a town site entry of an undivided one-twelfth interest in certain lots within the town of Silverton, executed a quitclaim deed attempting to convey the same to one Rowland; on July 18, 1881, said Rowland attempted by quitclaim deed to convey the property to appellee, Bruns. Both of said deeds were duly recorded in the office of the clerk and recorder of the proper county. On the fifth of May, 1882, Caulder executed another quitclaim deed conveying the property mentioned in the complaint to one Alexander; and on May twelfth following, Alexander in like manner conveyed to appellant, Blair.

The purpose of this action is to determine which of these grantees is entitled in law to the interests of Caulder; *i. e.*, to whom the trustee, who is made a nominal party and disclaims all personal interest, shall convey the legal title.

Appellant challenges the sufficiency of the conveyance from Caulder to Rowland, and from the latter to Bruns. Some question is made as to the *bona fides* of the transaction between Caulder, Rowland and Bruns; but this issue was not sustained, and is practically abandoned on the appeal. A defective description is the ground of attack here urged. In this respect these deeds are exactly alike. Omitting the first clause, which locates the property in the county of San Juan and state of Colorado, the description is as follows: "All the right, title, interest and demand which the said party of the first part has or ought to have, in and to all those lots and parcels of land lying in the town of Silverton, in said venue, which remained undivided amongst the proprietors of said town site upon delivery of deeds by the trustee, S. E. Jones, of the said town site, to the said proprietors, the same being one-twelfth undivided interest in said undivided lots."

The complaint, and also the deeds through which Blair claims title, specifically describe five certain lots within the town named.

If the deed to Bruns operated to convey title, Caulder's interest in these lots passed to Bruns by virtue of his prior conveyance.

Is the foregoing description so uncertain as that the attempted conveyance to Rowland must be held to have failed of its purpose? We think not. In the first place, it shows that the parties contracted concerning a definite portion, one-twelfth, of certain lots or parcels of land in the town of Silverton, county of San Juan, and state of Colorado; and, secondly, it described the same as the lots or parcels of land which remained undivided among the proprietors of the town site of said town, upon a prior delivery of deeds by the trustee to such proprietors. It covered all of Caulder's interest in the undeeded portion of the town site of Silverton.

The description contains no patent ambiguity; the language used is certain and plain. The only doubtful thing about it, is that it omits to specifically enumerate the lots or parcels of land which had not been conveyed by the trustee of the town site. This is, in our judgment, such an omission as may be supplied by extrinsic proofs. Such proofs would in no way tend to vary or contradict the terms of the written instrument; on the contrary, by extinguishing a latent ambiguity, they would make it impossible to effectuate the intent of the contracting parties.

"For this purpose, to apply the terms of the instrument to the subject matter, extrinsic evidence must be admissible in the interpretation of every instrument; and the law will not declare the instrument void for uncertainty, until it has been examined with all the light which contemporaneous facts may furnish": Mr. Justice Field, in Stanley v. Green, 12 Cal., 148. See also authorities there cited. See notes 487 and 510, Cow. and Hill's notes to Phillips on Evidence. Holding as we do, that the deeds under consideration were not void for uncertainty, it follows that the judgment must be affirmed. For the application of the rule calling for the "best evidence of which the case in its nature is susceptible," is here obviated by the pleadings. The answer admits Caulder's interest in the particular lots in controversy at the time he executed the Rowland conveyance; it also admits that these lots then constituted a part of the undeeded lands embraced in the town site of Silverton. Hence, there existed no necessity for proving the matter left in doubt by the description, *i. e.*, that such lots were among those which the trustee had not conveyed to the beneficiaries.

The oral proofs on this subject, would not, therefore, in any event constitute grounds for reversal.

The judgment is affirmed.

McKee et al. v. Bassick Mining Company.

October Term, 1885.

Striking out Incompetent Evidence—Instructions.—The admission of incompetent evidence, will not, in general, warrant a reversal if the court subsequently orders it stricken out, and instructs the jury to disregard it.

Appeal from Justice's Court—Time to file new Bond may be Extended.—Under section 1,986 of the general statutes, the court, in cases on appeal from justices of the peace, when the appeal bond is found insufficient or informal, may fix a reasonable time within which the party appealing may execute a good and sufficient bond; upon good cause shown, such time may afterwards be extended; or, if the appellant has attempted to comply with the order, by filing within the time limited a new bond, which is adjudged insufficient, the court may in the exercise of a reasonable discretion, make another order for the filing of a second new bond to cure the defects.

Sale—Change of Possession—Subsequent Purchaser with Notice.—Under sections 1,523 and 1,530 of the general statutes, a sale of personal property, unaccompanied by an actual and continued change of possession, is not void as to subsequent purchasers from the vendor who had notice of the claims of the prior purchaser.

A Refusal to give an Instruction which has already been given in substance is not error.

Appeal from the district court of Custer county. The opinion states the facts.

Blackburn & Dale, for the appellants.

A. J. Rising, for the appellee.

Helm, J. This was an action of replevin brought by appellants against appellee for certain personal property claimed by both parties to have been purchased from one Baldwin.

Appellee's attempted purchase ante-dates that of appellants. But appellants' contention is, that appellee failed to take such possession of the property as entitles it thereto in this action. The case was first tried by a justice of the peace; it was then appealed to the county court and the venue afterwards changed therefrom to the district court by consent of parties.

The evidence is quite voluminous and there is no assignment of error questioning its sufficiency to support the verdict. Numerous exceptions, however, were taken to the rulings of the court in admitting and rejecting testimony. But, after a careful consideration of the questions thus raised, we are unable to conclude that any error was committed in this respect sufficient to justify a reversal. The number of contractors from whom appellee purchased the property in controversy and the consequent complicated relations of the different parties thereto, rendered admissible evidence which would, under other circumstances, have been improper. The mistake, if any, made in admitting the declarations of Sayer on the question of his partnership with Baldwin, was corrected by the ultimate action of the court in striking this evidence out.

It is undoubtedly bad practice for a trial court to admit incompetent evidence before a jury, relying upon its right to afterwards strike out the same. It is true, as claimed by counsel, that such evidence is likely to have its weight with the jury, notwithstanding the subsequent rejection thereof and instructions from the court to disregard it. Courts should, therefore, when practicable, settle this question of competency prior to the admission of evidence, even though

the trial be thereby somewhat prolonged. But it is often impossible to pass intelligently upon the admissibility of testimony offered, until the court has heard it and until further proofs are in evidence. In view of this fact, no iron-clad rule upon the subject has been, or can be, adopted. We presume that courts will be cautious in exercising the privilege of admitting and then striking out evidence; and we believe that unless there be apparent misconduct in this regard, we ought not to interfere.

It is contended by counsel for appellants that the court erred in making an order for filing a second new appeal bond, and in extending the time allowed by such order. They assert that it was the duty of the court, at the expiration of the first order for filing a new bond, to have dismissed the appeal from the judgment of the justice of the peace, and that the court's action in not so doing was, to say the least, an abuse of discretion, for which the judgment afterwards rendered should be here reversed.

We cannot agree with counsel. Section 1,986 of the general statutes makes it the duty of the court, upon appeal from justices of the peace, when the appeal bond is found insufficient or informal, to fix a reasonable time within which the party appealing may execute a good and sufficient bond. There is nothing in this statute which prevents the court, for good cause shown, from extending the time that may have been thus fixed; or, if the appellant has attempted in good faith to comply with the order of the court, by filing within the time limited a new bond, yet, should such new bond be adjudged insufficient, we discover nothing in the statute which prevents the court, in the reasonable exercise of its discretion, from entering another order for the filing of a second new bond to cure the defects.

In charging the jury, upon request of appellee, the court gave the following instruction: "To constitute a subsequent purchaser in good faith under the statute of frauds and perjuries, such person must have made the purchase without notice of any claims of prior purchasers; and if the jury believe from the evidence that the plaintiffs had notice of the claims of the defendant to said logs as prior purchaser, then plaintiffs are not purchasers in good faith as against defendant." Appellants challenge the correctness of this instruction on the ground that it is in conflict with section 1,523 of the general statutes, being section 14 of the chapter on frauds and perjuries, which reads as follows: "Every sale made by a vendor of goods and chattels in his possession or under his control, and every assignment of goods and chattels, unless the same be accompanied by an immediate delivery, and be followed by an actual and continued change of possession of the things sold or assigned, shall be presumed to be fraudulent and void, as against the creditors of the vendor, or the creditors of the person making such assignment, or subsequent purchasers in good faith, and this presumption shall be conclusive."

Counsel say that under this statute the question of notice of the prior sale by the subsequent purchaser is of no importance; that where the prior purchaser has failed to take and retain possession of the property, the subsequent purchaser may be a purchaser in good faith, although he has knowledge of such prior purchase.

Considering this section by itself, there is some plausibility in counsel's view; there would at least exist a doubt as to whether or not the expression *in good faith* applied thereby to subsequent purchasers includes the idea of notice. It might, perhaps, be claimed that this phrase referred simply to cases where a subsequent purchase rests upon a valuable consideration, and is a *bona fide* transaction as between the vendor and vendee. But doubts upon this subject are, in our judgment, set at rest by a subsequent provision in our statute of frauds. Section 1,530 of the general statutes, being section 21 of said statute, reads as follows: "The provisions of this chapter shall not be construed to affect or impair the title of a purchaser for a valuable consideration, unless it shall appear that such purchaser had previous notice of the fraudulent intent of his immediate grantor, or of the fraud rendering void the title of such grantor."

While this section may more particularly refer to sections 1 and 17 of the act, yet it appears to us that it ought to be construed with section 14, in so far as the immediate question under consideration is concerned. Where there has been a prior *bona fide* sale of personal property, but possession has been allowed to remain temporarily with the vendor, there can be no doubt as to the bad faith of such vendor in making a subsequent sale thereof to another party. And if that other party have knowledge of the prior transaction, he must be aware of the fraudulent intent of the grantor. In our judgment, where the prior sale is completed as between the parties thereto, and the subsequent purchaser has knowledge of the fact, his case is covered by section 1,530 aforesaid.

The fourth instruction asked by appellants, but refused by the court, states a correct abstract legal principle; yet, if given, it might, under the circumstances of their case, have misled the jury. It is sufficient upon this point to say that, in so far as the particular matter intended to be reached by that instruction is concerned, it is embraced by the seventh instruction asked and given by the court. The other instruction asked and refused, was defective in that it omitted entirely the element of good faith on the part of the subsequent purchaser.

The charge, as a whole, states the law fully and fairly in favor of appellants. We discover no material error therein.

The judgment will be affirmed.

SUPREME COURT OF NEVADA.

STATE *v.* MARSHALL.

Filed December 1, 1885.

CONTINUANCE OF TRIAL—ABSENCE OF WITNESSES—AFFIDAVIT.—A continuance of a trial, on the ground of the absence of witnesses, will not be granted if the affidavit on which the motion is based fails to state that there are no other persons by whom the same facts can be proved.

APPEAL from a judgment of the third judicial district court, Esmeralda county, entered upon a verdict convicting the defendant of manslaughter.

J. F. Boller, for the appellant.

W. H. Davenport, attorney general, for the respondent.

BELKNAP, C. J. Appellant was convicted of the crime of manslaughter upon an indictment charging him with murder. The only exception arises upon the order of the district court denying a motion for a continuance of the cause, made upon the ground of the absence of one of the witnesses for the defendant.

The affidavit upon which the motion is based is fatally defective in this; it fails to show that there are not other persons by whom the defendant could prove the same facts that he expected to prove by the absent witness.

The judgment of the district court is affirmed.

SUPREME COURT OF OREGON.

CRAWFORD ET AL. *v.* BEARD ET AL.

Filed November 9, 1885.

FRAUDULENT CONVEYANCE — DECLARATIONS OF GRANTOR — FINANCIAL CONDITION OF GRANTEE—EVIDENCE.—In an action to set aside a deed for fraud on the creditors of the grantor, evidence of the declarations of the grantor, made after the execution of the deed, and that the grantee was not known to have any property at the time of purchasing, are without weight.

JUDGMENT—ENTRY OF UPON DEFAULT OR CONFESSION.—Whether a statute authorizing the clerk of the court to enter judgment, upon default or confession, without an order of court, is constitutional, not decided. The statute of Oregon authorizing such entry, having been in force for nearly twenty years, and acquiesced in by the bench and bar, should be upheld in accordance with the maxim *communis error facit jus.*

FRAUDULENT CONVEYANCE—CREDITOR, WHEN MAY ATTACK.—A creditor to whom an order has been given for an article which is afterwards furnished, may attack the *bona fides* of a deed made by the debtor during the interval between the date of the order and the time of delivery.

THE SAME—SUBSEQUENT CREDITORS, WHEN MAY ATTACK.—A conveyance may be attacked by subsequent creditors, if made with the intent to put the property out of the reach of debts, which the grantor, at the time of conveyance, intended to contract, and which he does not intend to pay, or has reasonable grounds to believe that he may not be able to pay.

THE SAME—FRAUDULENT INTENT, HOW DETERMINED.—Whether a conveyance was intended to defraud the creditors of the grantor may be inferred from the nature and character of the transaction itself, or from facts and circumstances connected with it. If the necessary result is to place the debtor's property beyond the reach of legal process, so as to delay creditors, it will be presumed to be done with a fraudulent intent; but when the act is apparently regular and fair upon its face, the intent must be gathered from the surroundings. The circumstances surrounding the deed in question considered, and held that it did not appear to have been given for a sufficient consideration.

THE SAME—FRAUDULENT CONVEYANCE MAY STAND AS SECURITY.—A deed obtained under suspicious or inequitable circumstances, or which is only constructively fraudulent, may be permitted to stand, in equity, as security for any purpose of reimbursement or indemnity.

APPEAL from the circuit court of Linn county. The opinion states the facts.

J. K. Weatherford and *D. R. N. Blackburn*, for the appellants.

H. H. Hewett and *L. Flinn*, for the respondents.

THAYER, J. This is an appeal from a decree rendered by the circuit court for the county of Linn, in a suit brought by the said respondents against the said appellants to subject certain real property to the payment of three several judgments obtained by the said respondents severally against the appellant John Beard, in actions at law in said circuit court. Said Crawford's judgment was recovered on the twenty-fifth day of September, 1883, for the sum of twelve hundred and ninety-one dollars and fifty-one cents with costs of action; said Brenner's, was recovered October 18, 1883, for the sum of seven hundred and twenty-two dollars and eighty-three cents with costs of action, and said Flinn's on the same day for the sum of three hundred and twenty-one dollars and three cents, with costs of action, Flinn's judgment was also against one J. J. Beard who was jointly liable with said John Beard. Executions were duly issued upon each of said judgments and returned unsatisfied prior to the commencement of the suit.

It appears that Crawford's judgment was upon three promissory notes one of which bore date in 1875 and is for five hundred and

ninety-six dollars, the other two August 4, 1881, and are for the aggregate sum of three hundred dollars; the latter notes were executed to Frank Bros., and transferred by them to Crawford. Brenner's judgment was upon a promissory note which bore date December 13, 1878. And Flinn's judgment was upon a promissory note executed to him by said John, and J. J. Beard, jointly, on the fifteenth day of August, 1881.

The said real property is situated in said county of Linn, and is a part of the said donation land claim of said John Beard and wife. Said Beard settled upon said land claim under the donation act and obtained a patent to it from the United States. The land in suit is the husband's half, consisting of about one hundred and eighty acres. Said John Beard, on the eleventh day of February, 1881, executed a deed of conveyance to his son, the said Ambrose Beard, which purported to convey the said land to him. The respondents alleged in their complaint that said deed was so executed by the said John Beard to the said Ambrose Beard to delay and defraud the creditors of the former, which is the main question to be determined upon the appeal. Two of the said judgments were obtained by default and entered by the clerk of said circuit court in vacation, without any order of the court, and the third was entered by the said clerk upon confession. The appellants' counsel deny the validity of said judgments, and claim that the statute authorizing a judgment to be entered in such a case is unconstitutional. Said counsel also claim that only part of the debt, upon which the said Crawford's judgment was recovered, existed at the time the said deed from John, to Ambrose Beard, was executed, and none of the debt upon which the said Flinn judgment was recovered, existed at said time. And it is further claimed upon the part of the said appellants that said deed was given in good faith and for a valuable consideration.

A large amount of testimony was taken in the case, a great portion of which was immaterial. The proof of statements and admissions made by said John Beard, long after he executed the said deed of the eleventh day of February, 1881, was unconnected with possession of the property or other circumstances, had no weight; nor was the proof that Ambrose Beard was not known to have had property at the time he is claimed to have purchased and paid for the land, of any consequence. It is not pretended that he paid for it with money and property he then had. He claims, however, that at the age of twenty years his father gave him his time, and that for four years or more prior to the date of the said deed he had occupied the said donation claim, including his mother's portion thereof, as a renter; that he worked it upon shares; that his father had sold his portion of the crop, and that at the time the land was deeded to him his father owed him for a thousand bushels of wheat and about three hundred dollars besides; that there was a mortgage upon the land in suit of one thousand five hundred dollars principal, and about four hundred and eighty dollars accrued interest; that he was

to pay for the land by assuming the said mortgage, was to give his father said thousand bushels of wheat and deliver to him four thousand bushels the following season. With this kind of arrangement it was unimportant whether his neighbors knew whether he had any property or not, or whether he had, prior to 1881, been assessed for taxes upon any property or not. The more important question was, whether his father did owe him a thousand bushels of wheat and three hundred dollars at the time referred to, or any wheat or money; whether he delivered to his father the said four thousand bushels of wheat or any wheat, as he claimed to have done. The proof as to what his neighbors thought about his general financial condition, and that he had not been assessed upon property for the purposes of taxation, or as to how much farmers are accustomed to make off of farms in that vicinity, has no tendency to disprove what Ambrose claimed were the facts of the case. Said proof, in my judgment, was almost or quite valueless.

The respondents' counsel claims that the whole of the debt, due to Crawford, existed when the deed was executed; and that the notes to Frank Brothers were for farming machinery which John Beard ordered in 1880, but did not receive until 1881, at about the time the said notes were executed, but they admit that none of the debt due to Flinn existed at said time.

The view I am inclined to adopt in adjusting the rights of the parties to the controversy, renders it necessary to consider first the question as to the validity of the alleged judgment against John Beard. It is contended upon the part of the appellants that the entry of judgment, by default or upon confession, involves the exercise of judicial power, and that, as all judicial power in this state is required to be vested in certain courts, the legislature had no authority to confer any such power upon the clerk. The decisions of other courts under similar provisions of statute or organic restrictions, are conflicting. The point of difference between them is a disagreement as to whether such entry is a judicial or ministerial act. If I were required to decide the abstract question I should be very much inclined to hold that the rendition of judgment, in all cases, was a judicial act. The mere entry of judgment, no doubt, is a ministerial duty, but it seems to me that before such entry can be made, there must be an adjudication, either that the facts admitted, or the confession and statement in the particular case, entitles the party to a judgment. But our statute upon the subject has been in force for nearly twenty years It may be said to have been acquiesced in by the bar, and it has tacitly been upheld by the courts. It has became a rule of practice, and, if pronounced invalid now, would cause disturbance in property rights, and occasion great mischief. When an act of the legislature has been so long recognized as binding, and important affairs of the community, affecting individual rights, been transacted in accordance with its provisions, it should not be disturbed unless it plainly and unequivocally conflicts with the organic law. An act which has been sanctioned by

the community ought not to be declared unconstitutional by the courts, when the question is in any decree doubtful. Whatever, therefore, my own private notions upon the subject are, so long as I am not positively certain of their correctness, I feel constrained to hold that such judgments are valid.

The appellants' counsel contend that neither the said Crawford nor the said Flinn has any standing to question the *bona fides* of the said deed, as a portion of the claim of the former, they allege, accrued after the execution of the deed, and that the whole of the latter's accrued after its execution. It is not so evident that any part of Crawford's claim accrued after the deed was made. The notes for the portion alleged to have so accrued, were given after said time, but the evidence shows that the order for the machinery was given by John Beard to Frank Bros. in 1880. The debt may not have legally been contracted until the machinery was delivered, but if the sale of the land was *mala fide*, a creditor to whom an order had been given for an article prior to the sale, and out of which the indebtedness arose, might question the transaction, although the article was not delivered until afterwards. The debt was in process of contraction at the time, and I think the creditor could claim, in case the debtor fraudulently sold his property during the interval, that it was done with intent to defraud him. The statute upon the subject is not confined to creditors. It says, "made with the intent to delay, hinder or defraud creditors *or other persons*, etc.:" Sec. 51 of chap. 6, Miscellaneous Laws. If said John Beard made said deed to Ambrose Beard to defraud his creditors, it would certainly have included the Frank Bros. claim that was transferred to Crawford.

The Flinn claim stood upon a different basis. That debt was not contracted until long after the deed was executed and upon record. It arose out of the renting of a warehouse let to John and J. J. Beard, and the deed could not be questioned by the holder of that debt unless it were shown that when the said John Beard executed the deed he had in view the creation of the said debt, and intended to defraud the creditor thereof. In the language of Bump on Fraudulent Conveyances, "The conveyance must be made with an intent to put the property out of the reach of debts, which the grantor at the time of the conveyance intended to contract, and which he does not intend to pay, or has reasonable grounds to believe that he may not be able to pay." The decision in Page & Co. v. Grant, 9 Or., 120, was not intended to establish any different doctrine than this, though the language employed in the opinion is very general. The purpose and intent for which the deed was given must be ascertained by an examination of all the facts and circumstances of the case, and if the legitimate inference drawn therefrom is that John Beard intended by the execution of said deed to delay, hinder or defraud his creditors, and that Ambrose Beard knew when he received it that such was the intent, then it is void as to existing creditors, or subsequent, if the grantor contemplated the contraction of the debts and did

not intend to pay them, or had reasonable grounds to believe that he would not be able to pay them.

The respondents' counsel contend that the conveyance from John Beard of the property in question included all his property; that the appellants' account of the affair was vague, uncertain and contradictory, and that it should be inferred therefrom, in view of the relations of the parties and the manner in which they had conducted their business, before and after the deed was executed, that it was intended to defraud the creditors of said John Beard. Fraud is established in such a case by inference or presumption. It may be inferred or presumed from the nature and character of the transaction itself, or from facts and circumstances connected with it. If the necessary result of the act is to place the debtor's property beyond the reach of legal process, so as to delay creditors, it will be presumed that it was done with a fraudulent intent, but when the act is apparently regular and fair upon its face, the intent must be gathered from the surroundings. In such a case the tests which reason and experience have shown were indicative of a fraudulent design and purpose, must be resorted to in order to ascertain the probable motive which actuated the parties in the affair. In this case, there is nothing upon the face of the transaction indicating bad faith. John Beard was in debt, it is true, but that did not preclude him from selling his farm. The deed is in the ordinary form. It recites a valuable consideration as having been received, and was placed upon record immediately after its execution. The conveyance was from a father to a son, but the latter was of full age and had an undoubted right to purchase his father's estate. The evidence, therefore, that the sale was made with intent to hinder, delay or defraud creditors must be sought for outside of the apparent facts in the case. The consideration recited in the deed is open to inquiry, and if shown to be only a pretense the inference would necessarily follow that the transaction was merely colorable. The respondents have attempted to show that there was no consideration in fact for the conveyance, and if they have succeeded in showing that, they have established their cause of suit. That is the vital question in the case.

The testimony tends to show that Ambrose Beard and his father had some negotiation in regard to the sale and purchase of the said land in 1880, that a bond for a deed was drawn up and some notes written out, but the matter was not consummated; that about the time the said deed was executed, they concluded to make a different arrangement whereby Ambrose was to buy the land, turn in a claim for a thousand bushels of wheat his father owed him, assume the mortgage upon said land that had been executed by John Beard to John Thomas, and the interest accrued thereon, amounting to four hundred and eighty dollars, and deliver to his father in the following fall four thousand bushels of wheat in full payment of the land. The deed was made and executed and recorded, and I am satisfied from the evidence that said Ambrose delivered to the said John

Beard in pursuance of the bargain, three thousand nine hundred and one bushels and fourteen pounds of wheat.

The testimony of J. J. Beard establishes that fact very fully. He testified that he and John Beard were partners in the warehouse business. Says: "We commenced about August 15, I won't be positive; some time in the fore part of August, 1881." He was then asked this question: "Will you please turn to the warehouse book for the firm for that year and state how much wheat was left stored there with the firm by Ambrose Beard in the fall of 1881?" Ans. "Three thousand nine hundred and one bushels and fourteen pounds." Ques. "State who sold that wheat when it was sold and the prices received." Ans. "The first lot of wheat sold was two hundred and twenty-nine bushels, for seventy-three and one-half cents per bushel, September 23. On September 24, he sold one thousand bushels for seventy-six and one-half cents. I haven't got the price of the other wheat: December 9, five hundred bushels; October 26, seven hundred and sixty-five bushels; December 17, one thousand four hundred and seven bushels and fourteen pounds; I think it was seventy-nine cents, wouldn't be positive." Question 12. "To whom was the money paid for the wheat?" Ans. "To John Beard, I gave him an order on himself for it. He was the treasurer."

These sales, as I compute them, amount to three thousand and forty dollars and sixty-nine and one-half cents, which was the product of the crop of wheat Ambrose Beard raised from the entire farm in the year of 1881. It is claimed by counsel for the respondents that John Beard paid out this money by paying off the interest on the mortgage, the four hundred and eighty dollars, and the expenses of working the place. I think evidence shows that John Beard did pay the four hundred and eighty dollars, though Ambrose claims that he repaid it, or that it was paid out of his money. There is no evidence that John Beard paid any of the expenses of the farm that I have discovered.

It is also claimed by said counsel that Ambrose Beard, after the deed was executed to him, continued to occupy the place as before; that John Beard remained in possession and controlled the management. I do not think the evidence shows that. It is true the parties lived in the same house, but that, with the other buildings upon the claim, and the orchard, were on Mrs. Beard's part. J. J. Beard testifies that Ambrose, after the deed was made, seemed to take the management of affairs; "there was an apparent change in the management and control of the place when the deed was executed."

As I view the matter, there was an intended sale of the property to Ambrose Beard. John Beard had grown old and evidently had not been successful in farming, and that some time prior to the summer of 1881, had conceived the idea of going into the warehouse business, and probably thought he would sell to Ambrose and take his pay, for the part that would be coming to him, in wheat; that he would be in the wheat business and could dispose of the wheat at a better advantage. The dealings between the parties were very loose.

It would not seem, by the answer filed in the suit, that they had any definite idea as to what their arrangements were. It was understood between them that the old gentleman owed his son a thousand bushels of wheat, or for that amount of wheat, and some money, but they could neither of them give an intelligent idea about it; yet they made the bargain upon that understanding, and the land was deeded to Ambrose.

That either of the parties actually intended to defraud the creditors of John Beard, I do not think can be maintained from the facts and circumstances of the case. I have no idea that the creditors were considered or thought of. The debts had been standing then a long time, except the portion for the farming machinery which was only in process of creation. No effort seems to have been made upon the part of the creditors, Crawford and Brenner, to collect them. It was not a case where a debtor was being pressed for payment and was compelled to make a shift. The claims were drawing interest at the rate of one per cent a month, and the holders were no doubt content to let them run. The interest at that rate kept up for seven or eight years, would produce an amount equal to the principal. Said creditors never manifested sufficient interest in their claims to ascertain before two years and a half that the said deed had been made, although it stood recorded during all that time in the record of deeds in the clerk's office in the town where they lived. They seem to have manifested an entire indifference in regard to the payment of their claims, and they are not entitled to any credit for leniency. The creditor who holds a note against a farmer, that is drawing twelve per cent annual interest, does not confer any benefit on the latter by a forbearance of the debt, as a general thing. It will ordinarily be only a matter of time when the interest eats up the farm.

But while the appellants may not have intended to defraud the creditors of John Beard by the transaction, yet there are suspicious circumstances as to the amount of consideration paid, and of the basis of the transaction. It does not appear sufficiently certain that John Beard owed Ambrose any wheat, or for any wheat, or any money, at the time the deed was executed, nor is it shown satisfactorily that Ambrose furnished the money that was paid for interest on the said mortgage to Thomas,—the four hundred and eighty dollars, and the three hundred dollars, paid subsequently. It is a well established rule of equity, that a deed obtained under suspicious or inequitable circumstances, or which is only constructively fraudulent, may be permitted to stand as security for any purpose of reimbursement or indemnity: Boyd v. Dunlap, 1 John. Ch., 478. I believe this case comes within the principles of that rule. I think that Ambrose Beard should be repaid for the wheat delivered to his father after the deed was executed,—the three thousand nine hundred and one bushels and fourteen pounds,—after making a reasonable reduction for the use of the premises during the four years he occupied them. According to his own testimony there

must have been raised off the premises in question in the year 1881, three thousand nine hundred and one bushels and fourteen pounds, about three thousand bushels. Allowing a third of that for the use of the land, it would amount to one thousand bushels, which, at seventy-eight cents a bushel would be seven hundred and eighty dollars, leaving due to said Ambrose two thousand two hundred and sixty-one dollars and sixty-nine and one-half cents. The rent for the other three years subsequent cannot be ascertained with any degree of accuracy. It does not appear what the farm has produced during that time. The product of 1881 is probably no criterion, as the amount of the yield in such cases depends very much on favorable conditions. The two thousand two hundred and sixty-one dollars and sixty-nine and one-half cents should draw interest, which at eight per cent per annum would be about one hundred and eighty-one dollars a year, which for four years would amount to seven hundred and twenty-one dollars, and added to the principal would make two thousand nine hundred and eighty-five dollars and sixty-nine and one-half cents. Four hundred dollars a year rent for the three years would be a safe estimate, I think. That would amount to twelve hundred dollars, which, taken from the former sum, would leave one thousand seven hundred and eighty-five dollars and sixty-nine and one-half cents due the said Ambrose as a charge upon said land.

The decree will therefore be: First; that from the proceeds of the sale of said land made under the decree of the circuit court, the costs and disbursements of said suit, and the expenses of making said sale be first paid. Second; that the sum of one thousand, seven hundred and eighty-five dollars and sixty-nine and one-half cents be next paid therefrom to the said Ambrose Beard. Third; that the claim of the said Crawford and Brenner be next paid therefrom, if sufficient remains. Fourth; that the claim of said Flinn be next paid therefrom, if sufficient remains; and the remainder, if there be any, be paid over to the said Ambrose Beard. That neither party recover costs or disbursements upon the appeal.

The chief justice is of the opinion that the statute conferring upon clerks power to enter a judgment in such a case is unconstitutional and void and that the maxim *communis error facit jus* inapplicable: Pease v. Peck, 18 How., U. S., 597.

SUPREME COURT OF CALIFORNIA.

No. 9,048.

BEAUDRY ET AL. v. DOYLE.

Department One. Filed November 26, 1885.

DEEDS—CONFLICTING BOUNDARIES—KNOWN MONUMENTS MUST CONTROL.—The plaintiffs and defendant owned adjoining tracts of land, each claiming under deeds from the same grantor. The lines along the northerly line of plaintiffs' land, and the southerly line of defendant's, which should be identical, varied, as to their course, one-fourth of a degree, which, according to the testimony, would make a difference of thirteen and one half feet in the location of the northwest corner of plaintiffs' and the southwest corner of defendant's land, which corners should be the same. *Held*, that the known and fixed monuments must prevail over the courses and distances; and, upon a review of the evidence, that the premises in dispute was included within the land granted to the defendant.

APPEAL from a judgment of the superior court of Alameda county, entered in favor of the plaintiffs, and from an order denying the defendant a new trial. The opinion states the facts.

Doyle, Barber, Galpin & Scripture, for the appellant.

A. M. Rasborough and *R. A. Redmond*, for respondents.

SEARLS, C. This is an action of ejectment to recover a tract of land of about five acres, situated in the county of Alameda. Plaintiffs had judgment, and defendant prosecutes two appeals, one from an order denying a new trial, and the other from the final judgment.

The land in controversy is parcel of the Peralta ranch, to which a patent issued to Domingo and Vicento Peralta, February 10, 1877.

A portion of the ranch had been surveyed and divided into blocks or plots by one Julius Kellesberger, as early as 1856, and a map thereof filed in the office of the county recorder of Alameda county, during that year.

Plaintiffs claim plot 41, and defendant owns plot 42, which lies north of and adjoins 41.

The land in dispute consists of a narrow strip along the north side of plot 41, and is claimed by plaintiffs under title to that plot, deraigned from the patentees through various mesne conveyances:

The immediate grantees of the Peralta title owned blocks 41 and 42, and on the same day conveyed block 41 to parties under whom plaintiffs claim, and block 42 to certain other parties under whom defendant holds.

The deed to defendant's grantor was first recorded.

The land lies on the westerly side of San Pablo avenue, formerly known as the county road, and extends from that avenue to the bay of San Francisco.

The deeds under which plaintiffs claim, describe their land as commencing at a post marked B, on the westerly side of the road (at southeast corner) running thence by course and distance to the bay, thence by course and distance northerly along the beach to the northwest corner, being the southwest corner of plot 42, thence easterly by course and distance to the northeast corner at the county road,

thence southerly along the county road to the place of beginning, and describes it as "known and designated as plot No. 41, upon a map of the ranches of Vicento and Domingo Peralta, surveyed by Julius Kellesberger, and filed in the office of the recorder of Alameda county on the — day of ——, 1856, and containing one hundred and sixty-three one-hundredths acres."

The deeds under which the defendant deraigns title in like manner describe plot 42, commencing at a post on the westerly side of the county road, at the northeast corner of land claimed by one Bertrand (plot No. 41); the description then gives the courses and distances around the tract, containing one hundred and two and twenty-five one-hundredths acres, and describes it as known and designated as plot 42, on map, etc., according to the survey above mentioned.

The lines along the northerly side of plaintiffs' land and the southerly line of defendant's, which should be identical, vary as to their course one-fourth of a degree, which, according to the testimony, would make a difference of thirteen and one-half feet in the location of the northwest corner of plaintiffs' and the southwest corner of defendant's land, which corners should be the same.

The description in all the deeds of each plot refers to the other in such manner as to show that the only difficulty should be in locating and fixing upon the ground the several points designated.

The question is not one of adverse possession, but of location on the earth's surface of the true lines of the paper title to the two plots.

There is no doubt, we think, that the lines, traced as in plaintiffs' deeds, will include the land in dispute.

Substantially, the plaintiffs do no more in making out their title, than to introduce their deeds, and to show that the calls in those deeds, include the disputed ground.

In answer to the case thus made, defendant introduced evidence tending to show that the land composing the two plots has been owned by separate persons since about the year 1852; that on the line between them there was a fence as early as 1852, leading from the county road toward the bay shore; that along the north side of this fence a road led from the county road to the vicinity of the bay, where Mason, the owner of plot 42, then lived.

That the grantor of plaintiffs cultivated plot 41, up to the fence on one side, and Mason, a grantor of defendant, farmed the land on the other side. That after the survey was made, the stake at the northeast corner of plaintiffs' plot, stood at the end or angle of the fence at the intersection of this cross road with the county road, now known as San Pablo avenue. That in 1864, when a new fence was necessary between plaintiffs and defendant, Beaudry, one of the plaintiffs, procured a surveyor to establish the northwest corner of plaintiffs' land and the southwest corner of defendant's land, that it was found there was an overlapping of thirteen and one-half to eighteen feet, but that the corner on the front at the avenue, was not then in dispute to the knowledge of the surveyor who made the

survey, who says it must have been agreed upon or at least no dispute about it. That plaintiffs and defendant divided the land in controversy, some thirteen to eighteen feet, and built a fence on the line, that plaintiff Beaudry built the end commencing at the avenue, and constructed it along the south side of the road leading to the bay. That the grantor of plaintiffs sold to one Holmes in 1855, two acres in the northeast corner of the claim which he fixes as being in the angle of the avenue and cross road. That on the twenty-ninth day of December, 1874, plaintiffs conveyed to one Spooner three acres of land shown by the deed to be at the same angle, and describes it as bounded by the defendant. There was a number of circumstances in addition, tending to show that the northerly line of plot forty-one, was, in fact, along the southerly side of the road leading from the avenue to the bay shore.

The more we have considered and analyzed the testimony the more have we become convinced that the northerly line of plaintiffs was in fact on the southerly side of said road. That the stake marking the northeast corner stood at the point indicated.

The testimony of Geo. W. Parsons, one of plaintiffs' witnesses, is in full accord with defendant's witnesses on the point. He had known the land since 1853. After speaking of the line between the two tracts of land and placing it on the south side of the road leading to the bay, he says: "I could not say where Kellesberger set the post at the northeast corner of Bertrand's claim (plaintiffs') but if he did set it at the northeast corner, it would have been at the end of the fence where it stands now, or very close."

It seems to us that there is no substantial conflict in the testimony as to where the corner post in fact stood—that it was at the angle of the fence on the south side of the road leading from San Pablo avenue to the bay, and that the line of demarcation between plot 41 and plot 42, in the light of the testimony, is along the fence mentioned, on the south side of the road.

Upon the theory that known and fixed monuments will prevail over courses and distances, and upon the whole case as presented, we are of opinion the verdict should have been for the defendant, and that the judgment and order denying a new trial should be reversed and a new trial had.

FOOTE, C., and BELCHER, C. C., concurred.

BY THE COURT. For the reasons given in the foregoing opinion, the judgment and order are reversed and the cause remanded for a new trial.

No. 20,075.

PEOPLE *v.* JOHNSON.

Department One. Filed November 26, 1885.

INSTRUCTIONS PRESUMED CORRECT IN ABSENCE OF EVIDENCE.—A refusal to give instructions asked for in a prosecution for murder, will not be considered on appeal, when the transcript fails to contain the evidence. In such case, the instructions given will be presumed correct, if such a state of the evidence is conceivable, as may have rendered them correct.

APPEAL from a judgment of the superior court of Mendocino county, entered upon a verdict convicting the defendant, and from an order denying him a new trial. The opinion states the facts.

T. L. Carothers, for the appellant.

E. C. Marshall, attorney general, for the respondent.

FOOTE, C. Appeal from a judgment of conviction of murder in the first degree, and from an order denying a new trial, in the superior court of the county of Mendocino.

There is an absence of all evidence in the transcript before us; we cannot then say that the instructions asked by the defendant, and refused by the court, had any application to the case as made: People v. Herbert, 64 Cal., 545.

The same thing may be said as to the alleged error, that the court, not being requested so to do by the defendant, failed to instruct the jury as to what constituted either justifiable or excusable homicide.

That part of the court's charge in reference to the law of reasonable doubt, is not subject to the criticism made on it.

The jury were not misled into supposing that they were authorized to become "satisfied" of the defendant's guilt from anything except the evidence in the case.

The authorities cited by the defendant do not sustain him in the positions he has assumed.

As has been before stated none of the evidence given on the trial of this case is before us for examination.

We must presume, therefore, that the instruntions granted by the court at the instance of the prosecution, and its charge to the jury on its own motion, were proper, since such a state of the evidence therein is conceivable, as may have rendered them correct: People v. Padilla, 42 Cal., 535.

The judgment and order should be affirmed.

BELCHER, C. C., and SEARLS, C., concurred.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

No. 9,612.

WHITE v. DOUGLASS.

Department One. Filed November 26, 1885.

CONTEST FOR PURCHASE OF STATE LAND—EVIDENCE—FINDINGS.—In an action to determine a contest between applicants for the purchase of land from the state, as provided for under sections 3,414–3,416 of the political code, the evidence reviewed and held to support the findings and judgment in favor of the plaintiff.

BOARD OF REGENTS—INSTRUCTIONS FOR PURCHASE OF LAND—RATIFICATION OF.—Instructions purporting to emanate from the board of regents and addressed to the land agent of the university, directing him to receive applications for surveyed land in accordance with a designated manner, will be held to be the instructions of the board, if subsequently recognized, acted upon and enforced by them.

APPEAL from a judgment of the superior court of San Joaquin county, entered in favor of the plaintiff, and from an order denying the defendant a new trial. The opinion states the facts.

David S. Terry and *George A. Nourse*, for the appellant.

J. H. Budd and *W. L. Dudley*, for the respondent.

SEARLS, C. This is an action to determine a contest between applicants for the purchase of land from the state of California, as provided for under sections 3,414-3,416 of the political code.

The cause was tried by the court, a jury having been waived, and judgment was rendered upon written findings in favor of plaintiff, from which, and from an order denying a new trial, defendant appeals.

It is objected to the first finding of the court that the evidence shows without conflict that no purchase of the land described in the complaint, or any portion thereof, was made by plaintiff from Pico, but that an agreement was made to purchase over one thousand acres of land, including the land in controversy, provided the claim of Pico to the Moquelemos grant was confirmed by the supreme court of the United States. That plaintiff was in possession long before the date of such contract, and had improved the land prior thereto, and that neither his entry nor improvement were made under said contract.

The finding of fact standing by itself seems liable to the criticism aimed at it, but when taken in connection with other facts as found by the court, the reason of the objection fails.

The findings, as a whole, embody a history of plaintiff's connection with the land, his acts of control over it, improvements made thereon, contract for the purchase thereof from Andreas Pico, his failure to obtain title under such contract, the reason of such failure, and his subsequent application to purchase through the regents of the university of the state of California.

For convenience, as we suppose, the findings are divided into nineteen sections, and numbered consecutively from one to nineteen, and a part of the subject matter which might with propriety have been included in number one is embodied in number five, and the two findings read together, properly state the facts, deducible from the evidence, touching the attempted purchase from Pico.

The fifth finding is in the following language:

"That, in fact, said purchase of said land by plaintiff from said Pico was a conditional one, and said Pico agreed in and by the agreement of purchase thereof to repay to plaintiff said sum of one thousand five hundred and sixty dollars, in case the claim of said Pico to said land, as a part of said Mexican grant called 'Moquelemos,' should not be finally confirmed."

Had this last finding been attached to the first, it would have met the objection aimed at the former.

Separated from it, we cannot see that it loses its potency as a fact in the case.

The seventh finding of fact, among other things, finds that the rules and regulations of the board of regents of the university required all applications for land granted by congress for the use of an agricultural college to accompany such application with an affidavit containing, among other things, a statement that there were no occupations of, nor settlement upon, the land sought to be purchased, other than that of the applicant, and that the affidavit of defendant contained no such statement.

It is objected to this finding, that it was the land committee of the board of regents, and not the board, who promulgated the regulations in evidence, dated April 9, 1871.

The instructions purport to emanate from the board of regents, and are addressed to H. A. Higley, land agent of the university, directing him to receive applications for surveyed land in accordance with previous instructions, but to so change the required affidavit as to read, etc.

There is also in evidence, a resolution of the board of regents dated June 13, 1871, providing for the additional affidavit, required by the regulations of April 9, 1871, in cases of applications made prior to the date of said last-named instructions.

These proceedings show that the instructions of April 9, 1871, were recognized, acted upon and enforced by the board of regents, and whether originally formulated by the board as such, or by a committee, is not important.

The essential thing is, that they were put forth, published to the world, and acted upon, as the instructions governing their subordinates, and applicants for the purchase of university lands, so-called.

Defendant's application to purchase was filed February 26, 1874, and was accompanied with the affidavit hereinbefore mentioned, a copy of which is set out in the complaint herein.

According to the eighth finding, the board of regents of said university never accepted said defendant's said application to purchase * * * and said land was never located in said United States land office, Stockton district * * * for defendant's benefit.

The only evidence in the bill of exceptions on the subject is that of A. J. Moulder, land agent of the university, who says: "I cannot remember what I did in reference to the defendant's application, but the presumption is violent that I did in that case what I always

did in similar cases, and what it was my duty to do, that is, applied to the register of the land office of the Stockton district to select that particular tract of land as a portion of the one hundred and fifty thousand acres agricultural grant assigned by the legislature to the university."

If the land was in fact ever entered or application made therefor at the Stockton land office, the fact was one which could have been so easily proven, and the records of the land office, constituting, as they would, conclusive evidence on the point, in the absence of such proof we are not surprised that the court, upon the uncertain evidence set out, found as above stated.

There was no evidence that the board of regents of the university ever accepted defendant's application to purchase, or in any way passed upon his application, or did or performed any act or thing in the premises, save and except through their land agent, who received his application to purchase, and two hundred and ninety-six dollars and thirty-three cents as part of the purchase price which it was usual to exact when an application was filed.

This disposes of all the grounds upon which the motion for a new trial was based.

The facts as found by the court warrant the judgment entered, and we are of opinion the judgment and order denying a new trial should be affirmed.

BELCHER, C. C., and FOOTE, C., concurred.

BY THE COURT. For the reasons given in the foregoing opinion the judgment is affirmed.

No. 8,249.

MORRIS *v.* LACHMAN.

Department One. Filed November 26, 1885.

LEADING QUESTIONS MAY BE STRICKEN OUT.—It is within the discretion of the trial court to strike out leading questions put to a party by his counsel.

HEARSAY TESTIMONY SHOULD BE STRICKEN OUT.—Hearsay testimony given by the plaintiff, relative to what he heard the defendant had said, is incompetent, and should be stricken out.

SLANDER—DEFENDANT MAY WITHDRAW OBJECTIONABLE CHARGE IN ANSWER.—In an action for slander the defendant may withdraw a charge made against the plaintiff's reputation in his first answer, and, by the court's permission, file an amended answer leaving the objectionable matter out, and thereafter the plaintiff cannot show that such charge had been preferred on a previous trial, and attempted to be established by evidence.

THE SAME—BELIEF OF DEFENDANT—MITIGATION OF DAMAGES.—In such action, where the slanderous words were that plaintiff was a "horse thief and scoundrel," the defendant may testify as to his belief that his property had been stolen at the time he used the language, as tending to show his good faith, in mitigation of damages.

REFRESHING MEMORY FROM WRITING—WHEN PERMISSIBLE.—A witness cannot refresh his memory from an affidavit sworn to and subscribed by him *ex parte*, unless it appears that the witness had written the affidavit, or that it had been done under his direction at the time the facts occurred or immediately thereafter, or at some other time when the facts were fresh in his memory, and that he knew that the same were correctly stated in the writing.

INSTRUCTIONS—ARGUMENTATIVE ARE ERRONEOUS.—An instruction in such action to the effect that if the defendant did not know the plaintiff personally, he could not have referred to her or pointed her out as the object of the accusation contained in his language, is erroneous, as being argumentative and an instruction upon the weight of the testimony.

AN INSTRUCTION THAT EVIDENCE INTRODUCED "TENDS TO PROVE" a matter is not erroneous.

APPEAL from a judgment of the superior court of Alameda county, entered in favor of the defendant, and from an order denying the plaintiff a new trial. The opinion states the facts.

Tyler & Tyler, for the appellant.

J. P. Phelan, *Wm. Irvine* and *J. B. Reinstein*, for the respondent.

FOOTE, C. Action to recover damages for slander, in the alleged speaking by Lachman of and concerning the plaintiff and one Henry Cavendish, the words: "They are horse thieves and scoundrels."

The defendant filed a second amended answer, in which the main ground of defense was stated to be, that he believed his horse, harness and wagon had been stolen, and did not know the persons who had taken them, and that in using the language complained of, he had no reference to the plaintiff, but spoke it of those unknown persons who he honestly believed had committed a larceny of his property.

By the bill of exceptions as settled it appears that upon the trial of the cause the evidence showed that one Connolly had sold the property about which the controversy arose (which, it was contended, Lachman had accused plaintiff of stealing), to the plaintiff, and had given her a bill of sale therefor. That plaintiff had allowed Connolly to use the horse and wagon, and that he subsequently sold them to the defendant (then in New York), delivering them to Lachman's son, who was in charge of his father's business here while the latter was absent. That afterwards, and during defendant's absence in New York, plaintiff found the horse and wagon on the street in San Francisco and took them to Oakland, without notifying defendant or his son. Upon his return to San Francisco the defendant went to Oakland in search of his property; at which time and place he was alleged to have used the language set out in the complaint. Judgment was rendered for the defendant, and the plaintiff's motion for a new trial denied, and she appealed.

At the trial it was claimed, on the part of the plaintiff, that the defendant used the language set out in the complaint, of and concerning the plaintiff and Mr. Cavendish, while said Lachman was standing inside the door of Messrs. Lesher & Saunders' store in Oakland, and that plaintiff and Mr. Cavendish were passing by on the street in front thereof, and that just as they went by Mr. Lesher said to the defendant: "There goes the lady and gentleman who left the horse and wagon here now." To which defendant replied: "Lady and gentleman, be damned! they are horse thieves and scoundrels." And the plaintiff introduced evidence tending to show the speaking of the words by defendant as laid in the complaint.

It was within the court's discretion to strike out the leading question put to the plaintiff by her counsel. And the hearsay testimony given by her, relative to what she heard that the defendant had said, as she was passing Lesher's store, was clearly incompetent, and was properly stricken out.

The defendant had a right to withdraw the charge made against the plaintiff's reputation in his first answer, and by the court's permission, to file an amended pleading, leaving the objectionable matter out. And no error was by that tribunal committed in refusing to allow proof to be made that such a charge had been thus preferred on a previous trial, and attempted to be established by evidence.

The question which was asked the defendant by his counsel, and to which he was allowed to reply, relative to his belief that his property had been stolen at the time he used the language to which exception was taken, was proper, as tending to show his good faith in mitigation of damages, and was in no sense an opinion as an expert.

We are inclined to the opinion, that the court was right in refusing of its own motion, to allow the witness, Tracy, to refresh his memory from an affidavit before that time sworn to and subscribed by him *ex parte*. For the reason that the plaintiff did not include in the offer made by her counsel, proof that the witness had written the affidavit, or that it had been done under *his direction*, at the time the facts occurred, or immediately thereafter, or at any other time when the facts were fresh in his memory, and that he knew that the same were correctly stated in the writing: Section 2,047, C. C. P.

As a part of the charge given by the court and excepted to by the plaintiff, after objection duly made, was the following: "In determining the question as to whether the slanderous words charged were spoken about or concerning the plaintiff, it is proper for you to consider whether at this time, when these words were alleged to have been spoken, Lachman knew the person of the plaintiff or not, and if he did not know the person of the plaintiff at this time, how could he have referred to her, and how could he have pointed her out as the subject of his accusation?"

This is justly criticised as being argumentative, and instructing the jury upon the weight of testimony. By it they are in effect told that if the defendant did not know the plaintiff personally, he could not have referred to her or pointed her out as the object of the accusation contained in his language which is the matter of complaint. At least it is fairly susceptible of this construction, and may have misled the jury.

The other portions of the court's charge which are objected to, were not improper, in view of the declaration of this court as to the right of the trial judge to state the testimony given in a cause to a jury as "tending to prove" a matter: People v. Perry, 3 West Coast Rep., 674; People v. Vasquez, 49 Cal., 560.

For the error committed the judgment and order should be reversed and the cause remanded.

SEARLS, C., and BELCHER, C. C., concurred.

BY THE COURT. For the reasons given in the foregoing opinion, the judgment and order are reversed and cause remanded.

No. 20,072.

PEOPLE *v.* HAMBLIN.

Department One. Filed November 26, 1885.

CRIMINAL LAW—IMPEACHING WITNESS—EVIDENCE OF ARREST AND KEEPING DOOR OF GAMBLING HOUSE.—In a criminal prosecution, where the defendant is a witness in his own behalf, he cannot be impeached by evidence that on several occasions he was arrested for shooting at individuals; or that he knowingly acted as doorkeeper of a gambling house. Such evidence will be presumed to have prejudiced the defendant.

MURDER—MALICE—DELIBERATION AND PREMEDITATION.—When a killing of a human being is shown to be without extenuating circumstances, malice is presumed; when malice is thus shown, if the evidence clearly discloses deliberation or premeditation in the act of killing, or the existence of an intention to kill while giving the fatal blow, such killing is murder in the first and not in the second degree.

APPEAL from a judgment of the superior court of the city and county of San Francisco, entered upon a verdict convicting the defendant, and from an order denying him a new trial. The opinion states the facts.

E. S. Pillsbury, for the appellant.

E. C. Marshall, attorney general, for the respondent.

FOOTE, C. The defendant in this case was convicted of murder in the first degree, he moved for a new trial, the motion was denied, and from the judgment of conviction and the order denying a new trial he appeals.

The defendant was called as a witness in his own behalf. Upon cross-examination, the district attorney asked the following questions:

"Q.—I propose to ask you this question, sir: On the night or evening of the twenty-fourth of October, 1881, were you arrested on Third street or Kearny street, in this city, for shooting at a man by the name of James Sanderson, and whether or not you were imprisoned under said arrest in this building?"

"Q.—Were you imprisoned in the city prison here? Were you brought to the city prison, and imprisoned in the city prison at that time?"

"Q.—On the twenty-seventh day of December, 1872, in the city of Stockton, in this state, were you arrested and imprisoned for shooting at a man by the name of Bell, who was fireman on the locomotive on the pay car of the Central Pacific Railroad?"

"Q.—Were you arrested on the night of the twenty-seventh day of December, 1872, at the city of Stockton for firing at any man and imprisoned, and imprisoned for firing at any man up there?"

The witness was compelled to answer each of these questions, against his exceptions, as defendant.

In a case of recent occurrence in this state, where similar questions were put to a witness, this court said:

"The only possible object of asking the questions was to impeach the credibility of the witness. But the testimony was not admissible for that purpose. The mere fact that the witness had been arrested does not prove nor tend to prove that he had been convicted

of any offense; and until there is proof of conviction the witness was protected by the legal presumption of innocence. Hence, the rule formulated by section 2,051, code of civil procedure:

"'A witness may be impeached by the party against whom he was called by contradictory evidence that his general reputation for truth, honesty and integrity is bad, but not by evidence of particular wrongful acts, except that it may be shown by the examination of the witness or record of the judgment, that he has been *convicted* of a felony:' People v. Elster, 3 West Coast Rep., 37, and cases there cited."

In the case at bar, there was no effort whatever made to show that the defendant, the witness, had ever been convicted of a felony; the object of the questions seems to have been to make evident that on divers occasions he had been arrested for shooting at individuals. There the effort to discredit him stopped. The effect of this may have been to create a prejudice in the minds of the jury, against the defendant, as a man ready with a pistol to shoot at those who had incurred his displeasure. Hence, to allow the questions to be asked, and to compel their answer, was error, prejudical to the defendant.

This further question, on cross-examination, was asked the defendant:

"Q.—I suppose, Mr. Hamblin, that you know it was an unlawful business, while you were employed there as doorkeeper."

It was objected to, but the objection was overruled, and the witness required to answer.

The witness had previously testified to his being employed as doorkeeper at a place on Kearny street, in San Francisco, that was frequented by the deceased. It was legitimate, for the purpose of showing the terms of intimacy or the contrary of the defendant and deceased, by proper questions to locate the defendant. But in that connection it was improper to interrogate him, and force an answer which might show him to be a man engaged as doorkeeper of a gambling house, which was an unlawful employment, with a guilty knowledge of its nature. And the minds of the jury might thereby have been prejudiced against him, as a willful violator of law.

As we understand the part of the charge of the court complained of, it announced the proposition, taken in connection with the other portions thereof as given, that when the killing is shown to be without extenuating circumstances, malice is presumed; that when this malice is thus shown, if the evidence clearly discloses deliberation, or premeditation in the act of killing, or the existence of an intention to kill while giving the fatal blow, that such a killing is murder in the first, and not in the second degree. This is the law as stated in People v. Doyell, 48 Cal., 93–97, where the case of People v. Long, 39 Cal., 694, is explained.

And the court does not, therefore, appear in the whole charge as given to have committed error.

For the reasons stated the judgment of conviction and order denying a new trial should be reversed, and the case remanded for a new trial.

BELCHER, C. C., and SEARLS, C., concurred.

BY THE COURT. For the reasons given in the foregoing opinion, judgment and order reversed and cause remanded for a new trial.

No. 8,551.

PACKARD *v.* MOSS.

In Bank. Filed November 27, 1885.

COLOR OF TITLE DEFINED—VOID SHERIFF'S DEED MAY GIVE.—Color of title is an apparent title, founded upon a written instrument, such as a deed, levy of execution, decree of court, or the like. To give color of title, the conveyance must be good in form, contain a description of the property, profess to convey the title, and be duly executed. A sheriff's deed, containing these requirement, will give color of title, although in fact invalid and insufficient to pass the title, or actually void, because founded on a void judgment, or voidable.

THE SAME—CONVEYANCE BY TENANT IN COMMON—OUSTER—ADVERSE POSSESSION.—If real estate is held in common and one tenant assumes to convey the entire land, and does convey by metes and bounds, his deed will give color of title, and if possession is taken under such deed, the purchaser claiming title to the whole premises, it is an actual ouster and disseizin of the co-tenant, and possession is adverse, and if continued for a sufficient period will bar the right to recover by the co-tenant.

WHAT CONSTITUTES COLOR OF TITLE IS A QUESTION OF LAW for the court. The question of occupancy under it is one of fact for the jury.

THE SAME—CASE IN JUDGMENT.—Defendant took possession of the land immediately after receiving a deed from a tenant in common in December, 1864, and went to improving the land and making up the fences; he constructed levees to protect it from overflow; had and claimed the exclusive possession and received all the rents and profits and paid all taxes thereon; inclosed the land with a fence of posts and boards, most of it five boards high and part four; he moved some of the fences placed there by his grantor in 1862, and repaired the fences and "put it under good fences;" and had a conversation with plaintiff soon after purchasing, from which it appeared plaintiff knew of his purchase. *Held*, that defendant entered in possession of the premises under a claim of title, exclusive of other right, founded upon a written instrument, purporting to convey the property, and that such conveyance gave him *color of title* to the premises. That the testimony was sufficient to warrant the jury in finding, as a matter of fact, that defendant had held the land adversely to plaintiff for more than five years next before the commencement of this action.

STATUTE OF LIMITATIONS—TITLE ACQUIRED FROM U. S. GOVERNMENT.—The statute of limitations does not commence to run against a title, founded upon a certificate of purchase from the state of swamp and overflowed lands, until the same have been certified to the state by the United States government.

THE SAME—RIGHTS OF ENTRY.—Where a person out of possession has two separate rights of entry, the loss of one by lapse of time, does not impair the other, and if such person acquires a second right he is allowed a new period in which to pursue his remedy, although he has neglected the first.

APPEAL from a judgment of the superior court of San Joaquin county, entered in favor of the defendant, and from an order denying the plaintiff a new trial. The opinion states the facts. The opinion in department is reported in 3 West Coast Rep., 769.

J. B. Hall, for the appellant.

J. H. Budd and *F. T. Baldwin*, for the respondent.

SEARLS, C. The judgment and order denying a new trial in this cause were affirmed upon the authority of Packard v. Johnson, No. 8,850, by department one, in an opinion filed September 11, 1884;

3 West Coast Rep., 763 and 769. Upon petition of counsel for appellant, a hearing in bank was ordered in each of the two causes. The facts being essentially the same in both cases, reference is herein made to the former opinion, which was prepared in Packard v. Johnson.

We think the conclusions reached in the former decision, with a single exception, are so manifestly proper as to call for no comment.

The exception to which we refer, and on account of which we suppose a hearing in bank was ordered, relates to the question raised upon the plea of the statute of limitations.

It was, as we infer from the record, the dominant question upon the trial, and its proper solution is not without difficulties.

The instructions of the court to the jury are clear and explicit, and involved a correct exposition of the law touching the question of ouster and adverse possession.

In the former opinion it said: "In the case at bar the question of ouster and of adverse holding for five years after the ouster, were questions of fact, and there was evidence at the trial in the court below to sustain the finding of the jury upon that issue."

We understand appellant to attack this position, not upon the ground that the instructions of the court were improper as abstract propositions of law, but upon the theory that there was not sufficient evidence to sustain the legal propositions. His contention is, that the evidence fails to show an adverse possession in defendant. The facts essential to an understanding of the case may be stated in brief as follows: W. K. Melville purchased from the state of California, and paid in full for three hundred and twenty acres of swamp and overflowed lands, situate in San Joaquin county. The purchase was made under the act of the legislature of the state of California, providing for the sale and reclamation of the swamp and overflowed lands of the state, approved April 21, 1858.

On the thirteenth of August, 1858, Melville received a certificate of purchase of the land in question, in the usual form, under which he was entitled to ask for and demand a patent, when thereafter the lands should be confirmed and certified to the state by the general government.

On the twenty-sixth of April, 1859, Melville assigned to Alvin G. Ward, who thereafter and on the fifteenth of November, 1859, assigned to plaintiff and one A. J. Sanor.

The land in question was listed and certified over to the state of California by the United States government on the thirty-first day of December, 1866, pursuant to the act of congress of September 28, 1850.

On the twenty-fifth day of March, 1859, one Wm. E. Cocke recovered judgment by default against Melville in the district court of San Joaquin county, upon which execution issued and was levied upon the property in question, which was in due time sold, purchased by Cocke, and not having been redeemed, the latter received

For the reasons stated the judgment of conviction and order denying a new trial should be reversed, and the case remanded for a new trial.

BELCHER, C. C., and SEARLS, C., concurred.

BY THE COURT. For the reasons given in the foregoing opinion, judgment and order reversed and cause remanded for a new trial.

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We understand appellant to attack this position, not upon the ground that the instructions of the court were improper as abstract propositions of law, but upon the theory that there was not sufficient evidence to sustain the legal propositions. His contention is, that the evidence fails to show an adverse possession in defendant. The facts essential to an understanding of the case may be stated in brief as follows: W. K. Melville purchased from the state of California, and paid in full for three hundred and twenty acres of swamp and overflowed lands, situate in San Joaquin county. The purchase was made under the act of the legislature of the state of California, providing for the sale and reclamation of the swamp and overflowed lands of the state, approved April 21, 1858.

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The land in question was listed and certified over to the state of California by the United States government on the thirty-first day of December, 1866, pursuant to the act of congress of September 28, 1850.

On the twenty-fifth day of March, 1859, one Wm. E. Cocke recovered judgment by default against Melville in the district court of San Joaquin county, upon which execution issued and was levied upon the property in question, which was in due time sold, purchased by Cocke, and not having been redeemed, the latter received

a sheriff's deed, and on the twenty-fourth day of December, 1860, conveyed by quitclaim deed to A. J. Sanor. Sanor and wife conveyed to defendant Moss, by deed dated December 5, 1864. The certificate, assignment and several deeds mentioned, were recorded in the proper county.

The judgment in Cocke v. Melville was entered by the clerk of the court, upon a default taken while a demurrer by defendant to the complaint was on file and undetermined, and the judgment, execution and sheriff's deed were admitted in evidence, not as proving title, but as evidence that the grantor of the defendant entered upon the land in question under color of title, and in aid of defendant's plea of adverse possession and the statute of limitations.

The first question presented is, Did the sheriff's deed to Cocke give color of title? *Color of title* is defined to be an apparent title, founded upon a written instrument, such as a deed, levy of execution, decree of court, or the like: 3 Waits' Act. and Def., 17; 35 Ill. R., 394.

To give color, the conveyance must be good in form, contain a description of the property, profess to convey the title, and be duly executed: La Frombois v. Jackson, 8 Cowen, 589.

Containing these requirements, it will give color of title, although in fact invalid and insufficient to pass the title, or actually void, or voidable: Ewing v. Burnett, 11 Peters, 41; Murray v. Shanklin, 4 D. & B., N. C., 289.

It will not do to say that a deed is, for reasons not apparent on on its face, *void*, and, therefore, cannot give color of title, for color of title is not, and does not profess to be, title at all; *color of title* is that which is a title in appearance, but not in reality: Wright v. Mattison, 18 Howard, U. S., 50.

"One of the very essentials of color of title is that it shall be raised by an instrument which appears to convey a title, but in reality conveys none; and it would seem almost ridiculous that it could be of any sort of importance for the purpose of acquiring title under such a conveyance, whether the grantee acted in good faith in obtaining it or not:" Wood on Limitations, 530-31.

The sheriff's deed to Cocke purported on its face to convey the title to the latter, contained a description of the property, and was properly executed.

At least it is not urged that the sheriff's deed is in other than the usual form. As a foundation of title, it is worthless, by reason of the void judgment in which it had its inception. We are not, however, considering it as a medium for the conveyance of title. An adverse claimant of land is a wrong-doer, and, as such, is treated and known to the law, until, by the lapse of years, his acts before tortious, are consecrated by time and dignified as lawful.

A deed which gives color of title simply measures and fixes the limits, the extent of a wrongful possession, and, while it continues wrongful, may be used against the wrong-doer as evidence of the extent of his wrongful possession, and when, by five years acquies-

cence, the wrongful acts of possession come to be recognized as lawful, the deed which before fixed the extent of the wrong stands as a landmark to bound the right acquired.

Before, it defined the limits to which an unlawful possession extended. After five years of adverse possession, the occupancy having become valid, the boundaries which before marked the wrongful possession remain as indices of the extent of the right.

Any deed, though unrecorded, purporting to convey title, no matter on what founded, is *color of title:* Lea v. Polk Co. Copper Co., 21 Howard, U. S., 493; Dickenson v. Breeden, 30 Ill., 279; Hunna v. Renfro, 32 Miss., 125.

A sheriff's deed, without proof of the judgment and execution, is sufficient to give color of title: La Frombois v. Jackson, 8 Cowen, N. Y., 589.

In Minot v. Brooks, 16 N. H., 374, it was held that an unrecorded quitclaim deed of all a grantor's title, under a collector's deed, though the collector's deed conveyed no interest, is *color of title.*

And a deed founded upon a void or voidable decree in chancery, gives color of title: Whitesides v. Singleton, 1 Meigs, Tenn., 207.

From the result of the foregoing and other cases, we conclude the sheriff's deed to Cocke was sufficient to give to the grantee named therein color of title.

So, too, the conveyance of Cocke to Sanor of September 24, 1860, though in form but a quitclaim deed, was, under the doctrine of Minot v. Brooks, above quoted, sufficient to give color of title to the latter.

According to the testimony of Sanor he purchased from Cocke on his own account, paid a valuable consideration, entered into the exclusive possession, built a house and barn upon the land, resided with his family thereon, inclosed it by a fence—a post and rail fence—a four board fence around a part and a part three boards, had his stock upon it and the exclusive use and enjoyment of it. That he kept it fenced. That plaintiff lived near and must have seen it often, etc. Had advised him to buy it in the first instance, etc.

We may, however, waive all question of adverse possession by Sanor or Cocke, and what follows?

Sanor was, with plaintiff, assignee under the Melville certificate of purchase from the state. As such assignees they would, if in possession, be deemed, in the absence of a showing to the contrary, tenants in common.

On the fifth day of December, 1864, Sanor and wife conveyed the whole of the property to the defendant Moss by a deed which describes the property and recites that they "grant, bargain, sell, release, remise and convey to said Moss," etc. This deed was sufficient to convey a legal title: Touchard v. Crow, 20 Cal., 150. It was also sufficient to give to the defendant, who entered into possession under it, color of title.

If real estate is held in common, and one tenant assumes to convey the entire land, and does convey by metes and bounds, his deed

will give color of title, and if possession is taken under such deed, the purchaser claiming title to the whole premises, it is an actual ouster and disseizin of the co tenant, and possession is adverse, and, if continued for a sufficient period, will bar the right to recover by the co-tenant: Weisinger v. Murphy, 2 Head, Tenn., 604; Bogardus v. Trinity Church, 4 Paige, N. Y. Chan. R., 178; Leonard v. Leonard, 10 Mass. R., 231.

So long as one of two tenants in common remains in possession, as he is presumed to hold for himself and for his co-tenant, his acts of ownership will naturally be construed as evidence of the possession of both, but independent of authority, we can see no good cause in reason why a sale of the entire property by a tenant in common, who places the grantee in full possession, in consonance with his deed, and who thereupon claims title to the whole, should not be treated as an ouster of the co-tenant, whose rights and possession have been thus signally ignored.

"It is not necessary, in order to prove that a tenant in common has claimed the whole exclusively, that it should be proved that he made an express declaration to that effect, for it may be shown clearly by acts as well as words. Where one enters and takes the profits exclusively and continuously for a long period, under circumstances which indicate a denial of a right in any other to receive them, as by not accounting, with the acquiescence of the other tenants, an ouster may be presumed in this country, as well as it has appeared it may in England under like circumstances:" Angell on Limitations, sec. 432; Low v. Patterson, 1 Watt & Serg., Penn R., 191; Brackett v. Norcross, 1 Greenleaf, Me. R., 89; Simmons v. Nahart, 3 Allen, 316; Lefavour v. Hannan, 3 Allen, 354; Frederick v. Gray, 10 Serg. & Rawle, Penn. R., 182.

What constitutes color of title is a question of law for the court. The question of occupancy under it is one of fact for the jury, and we have referred to the foregoing rules and authorities touching this last question that the sufficiency of the evidence introduced may be more readily understood and compared.

There was testimony tending to show that defendant Moss took possession of the land immediately after receiving his deed in December, 1864, and went to improving the land and making up the fences; that he constructed levees to protect it from overflow at an expense of about twelve dollars per acre; that he had and claimed the exclusive possession and received all the rents and profits and paid all taxes thereon; that he inclosed the land with a fence of posts and boards, most of it five boards high and part four; that he moved some of the fences placed there by Sanor in 1862, and that he repaired the fences and "put it under good fences;" that he had a conversation with plaintiff soon after purchasing, from which it appeared plaintiff knew of his purchase.

There was also testimony tending to show that as far back as 1861 plaintiff signed and swore to a petition to the swamp land commissioners, which stated Sanor, the grantor of defendant, to be the owner of the land in question.

We conclude from our examination of the case:

First—That defendant entered in possession of the premises under a claim of title, exclusive of other right, founded upon a written instrument, purporting to convey the property; and that such conveyance gave him *color of title* to the premises.

Second—That the testimony was sufficient to warrant the jury in finding, as a matter of fact, that defendant had held the land adversely to plaintiff for more than five years next before the commencement of this action, and that the court did not err in its instructions to the jury, given at request of defendant, or in its refusal of certain instructions asked by plaintiff.

In reaching this conclusion, we have assumed, as correct, the position that the statute of limitations did not begin to run as against the title of plaintiff, founded upon his certificate of purchase from the state, until the land was certified to the state in December, 1866, as stated in the opinion of department one of this court in Packard v. Johnson, No. 8,850, 3 West Coast Rep., 763.

No doubt the possession of defendant and of Sanor, his grantor, prior to 1866, was adverse to any right of entry which plaintiff then had, but it is well settled that where there are two separate rights of entry, the loss of one by lapse of time does not impair the other, and if a person acquires a second right, he is allowed a new period in which to pursue his remedy, although he has neglected the first: 2 Cruise's Digest, 498.

It does not follow, however, that the possession of defendant, which before was adverse to the plaintiff, ceased to be so when in December, 1886, plaintiff's title was perfected, or the badges of occupancy and possession with which defendant had surrounded the property or had placed upon it, ceased to be evidence of a continued adverse holding against the new title.

We are of the opinion the judgment of affirmance heretofore entered should stand as the judgment of the court.

BELCHER, C. C., and FOOTE, C., concurred.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

No. 9,710.

ESTATE OF DOYLE.

In Bank. Filed November 27, 1885.

NEW TRIAL ON CONTEST OF WILL—ORDER ON IS APPEALABLE.—An order denying a motion for new trial, in a contest for the probate of a will, is an appealable order, under sections 1,714, 1,717, and 963 of the code of civil procedure.

APPEAL from an order of the superior court of the city and county of San Francisco, denying a motion for a new trial. The opinion states the facts.

R. Percy Wright, for the appellant.

H. C. Newhall, for the respondent.

MORRISON, C. J. This is a contested will case, and the appeal is from an order of the court below denying the contestant's motion for a new trial, in the matter of contest for the probate of the will. The only question before us is, whether such an order is an appealable order. We think that under sections 1,714, 1,715, 1,716, 1,717, 963, code of civil procedure, the order appealed from is an appealable order, and, therefore, the motion to dismiss the appeal is denied.

THORNTON, J., ROSS, J., and MYRICK, J., concurred.

No. 11,018.

PARKER *v.* BERNAL ET AL.

Department Two. Filed November 27, 1885.

JUDGMENT—AMENDMENT AFTER AFFIRMANCE.—Where a judgment is affirmed by the supreme court, and the remittitur filed in the court below, a motion by the appellants, in the lower court, to amend the judgment in material particulars, is properly denied, when such questions could have been presented to the supreme court on the former appeal.

APPEAL from an order of the superior court of the city and county of San Francisco, entered in favor of the plaintiff. The opinion states the facts.

Moses G. Cobb, for the appellants.

Charles H. Parker, for the respondent.

THE COURT. The judgment in this case was affirmed and the remittitur sent from this court to the court below: 4 West Coast Rep., 428. After the remittitur was received and filed in the court below a motion was made by defendants to amend the judgment which had been affirmed by striking out some portions of it which were material to such judgment. This motion was denied, and from the order denying it this appeal is prosecuted.

No reason which commends itself to our judgment appears for granting such a motion. The affirmance of the judgment foreclosed all such questions as those which would arise on the motion. If the defendants, or any of them, were aggrieved by the portions of the judgment sought to be stricken out, they should have been brought before this court on the former appeal. The judgment disposed finally of all the questions involved in the motion.

Further, it is said, that the portions of the judgment sought to be stricken out were inserted by the clerk without authority and by inadvertence. The denial of the motion by the court disposes of the question of inadvertence on the testimony before it, adversely to the defendants and we find no error in the court so ruling.

The appeal in this case was taken for delay, and the order is affirmed with one hundred dollars damages. Ordered accordingly.

No. 8,550.

PACKARD v. JOHNSON.

In Bank. Filed November 27, 1885.

JUDGMENT AFFIRMED on the authority of Packard v. Moss, *ante*.

APPEAL from a judgment of the superior court of San Joaquin county, entered in favor of the defendant, and from an order denying the plaintiff a new trial. The facts were similar to those in Packard v. Moss, *ante*. The opinion in department is reported in 3 West Coast Rep., 763.

J. B. Hall, for the appellant.

J. H. Budd and *F. T. Baldwin*, for the respondent.

THE COURT. Upon the authority of Packard v. Moss, No. 8,551, the judgment and order are affirmed.

No. 8,589.

HIBERNIA SAVINGS AND LOAN SOCIETY v. MOORE ET AL.

In Bank. Filed November 30, 1885.

NEW TRIAL—MOTION FOR—WAIVER OF IRREGULARITIES. — Where a motion for a new trial is made upon a prepared statement, to which amendments are prepared and settled, and certified according to law, without any objection taken, or right reserved to object thereafter, to any irregularities in the proceedings leading up to, or in connection with the settled statement; and the motion is heard and decided upon the statement without any objection, any irregularities in the proceeding upon the motion is waived, and cannot be availed of in the supreme court for the first time. Such statement, in connection with the judgment roll, is the record on appeal from the order denying the motion.

THE SAME—DECISION INCLUDES FINDINGS OF FACT.—Under section 633 of the code of civil procedure, the "decision" includes not only the conclusions of law, but the facts found; and a notice of intention to move for a new trial, which designates, as ground of the motion, that the evidence does not warrant the decision, is the equivalent of the expression that the evidence is insufficient to support the findings.

PRINCIPAL AND AGENT—PERSONAL JUDGMENT AGAINST AGENT.—A finding that the money for which a note and mortgage were given, was borrowed by one purporting to act as agent, solely for and on account of the principal, will not warrant a personal judgment against the agent on the note.

THE SAME—AUTHORITY OF AGENT TO EXECUTE NOTE—FINDINGS.—A finding that a note and mortgage *purport* to be executed in the name of the principal, by her attorney in fact, who, in executing them, assumed to be authorized, is not a finding that such attorney in fact was authorized to execute the note and mortgage.

THE SAME—AGENT CANNOT MORTGAGE PRINCIPAL'S LAND FOR INDIVIDUAL DEBT.—An attorney in fact, with authority to borrow money and mortgage the land of his principal, cannot give a mortgage thereon to secure his individual debt. A mortgage so given, is not binding on the principal, if the mortgagee knew that the money borrowed was intended to be used by the agent for his individual purposes.

APPEAL from a judgment of the superior court of the city and county of San Francisco, entered in favor of the plaintiff, and from an order denying the defendants a new trial. The opinion states the facts.

Shafter, Parker & Waterman, for the appellants.

Tobin & Tobin, for the respondent.

MCKEE, J. The action in hand was brought for the recovery of a money judgment and foreclosure of a mortgage upon real property, alleged to have been given by the defendants Chas. C. Moore and his mother, Mary A. Moore, to the Hibernia Savings and Loan Society as security for the payment of fifty-seven thousand five hundred dollars, money borrowed by the defendant Charles.

Part of the mortgage premises is a parcel of land in the city and county of San Francisco, which belonged to the defendant Mary, as her sole and separate estate. In her answer to the complaint she avers that the note and mortgage were given by her son to secure payment of money borrowed by him from the plaintiff, to pay his own existing, antecedent, private, personal and separate indebtedness, and not for her use or benefit, or for or on her account, and she denies that she signed either of said documents, or that she was personally present, or in any way a party to the transaction between the plaintiff and her son, in which they were given; or that she authorized him to sign her name to the note or mortgage. On the contrary, she avers he had no authority to sign her name to the note, or in her name to execute the mortgage upon her separate property for the money borrowed for his individual purposes, and this was well known to the plaintiff when it loaned him the money and received from him his note and mortgage as security for its repayment.

On the trial of the issues framed by the complaint and answer, the court decided that the plaintiff was entitled to recover against the defendant Charles upon the promissory note, and against the defendants Charles and Mary to a decree for the sale of the mortgaged property, including the separate property of the defendant Mary, to satisfy the judgment; and from the decree and an order denying her motion for a new trial, the defendant Mary appeals.

The grounds of the motion for a new trial were: That the evidence was insufficient to justify the decision; that the decision was against law, and that errors of law had occurred at the trial to which exceptions were taken.

The motion itself was made upon a statement of the case.

The contention is made that this statement must be disregarded, because the notice of motion designated as grounds of the motion, (1) Surprise; (2) Newly discovered evidence; (3) Insufficiency of the evidence to justify the decision; (4) The decision was against law; and (5) Errors of law; and that the motion would be made upon affidavits as to the first, second and third grounds, and upon a statement of the case as to the fourth and fifth grounds. But there were no affidavits made or filed. The motion was made upon a prepared statement to which amendments were proposed, and the same was settled and certified according to law without any objection taken, or right reserved to object thereafter, to any irregularity in the proceeding leading up to, or in connection with, the settled statement; and the motion was heard and decided upon the statement without any objections of irregularities. Any irregularity in the proceeding

upon the motion was, therefore, waived: Hobbs v. Duff, 43 Cal., 486; Gray v. Nunan, 63 Cal., 220; and cannot be availed of for the first time in this court.

In connection with the judgment roll in the case, the statement constitutes the record on appeal, from the order denying the motion for a new trial, upon which the case in this court is to be reviewed.

The first ground of the motion is that the evidence does not justify the decision.

The "decision" includes not only the conclusions of law, but the facts found: Section 633, C. C. P.; and a notice of intention to move for a new trial, which designates as ground of the motion, that the evidence does not warrant the decision, is the equivalent of the expression that the evidence is insufficient to support the findings: Donohoe v. Mariposa Co., 5 West Coast Rep., 167. The question therefore arises, does the evidence support the findings of fact and conclusions of law against the appellant Mary?

It is admitted that she was not, in person, a party to the transaction in which the note and mortgage were given by the son. At the time of the transaction she resided in the state of New York and had not been "for many years in California." Personally, therefore, she did not sign the note or execute or deliver the mortgage. But the court finds:

1. That the note and mortgage purport to be executed by said Mary Adams Moore by Charles Carroll Moore, her attorney in fact; that said Charles Carroll Moore in so executing said note and mortgage as her attorney in fact, assumed and claimed to be authorized to do so under and by virtue of a power of attorney, made to him by the said Mary, on the twenty-second of October, 1864, which, by its terms, constituted and appointed him her attorney in fact for her and in her name to take charge and possession and control of all real estate belonging to her in the said city and county, and to mortgage and convey the same as he might see fit.

2. That this power of attorney authorized him to execute and deliver the mortgage in the name of Mary A. Moore and as her act and deed; and that under it he did sign her name to the note and mortgage "in pursuance of said authority."

3. That the moneys for which the note and mortgage were given were borrowed by the defendant Charles, for the use and benefit of the defendant Mary, and for and on her account, and were *not* borrowed by him for the purpose of paying, and were not used to pay, the existing, or antecedent, or private, or personal, or separate indebtedness, or any indebtedness of said defendant Charles.

"That plaintiff had no notice at the time said loan was made, or at the time of the execution or of the delivery of said note and mortgage, * * * or at any time, or at all, that said sum of money was borrowed for the purpose of paying, or was used to pay, the antecedent, or private, or personal, or separate indebtedness, or any indebtedness, of said Charles Carroll Moore, and that at the time of the execution of said note and mortgage * * * the piece of land

eighthly described in said amended complaint was, and had been long prior thereto, and still is, the sole and separate estate of said Mary Adams Moore."

The conclusion drawn by the court from its finding is, that the plaintiff is entitled to judgment against the defendant Charles only for the amount of the principal and interest due upon the note, and judgment against him only was given and entered. This conclusion is not legally drawn from the fact, as found by the court, that the money, for which the note and mortgage were given, was borrowed solely for and on account of the defendant Mary. The fact and the conclusion are contradictory of each other.

Besides, the finding that the note and mortgage *purport* to be executed in the name of Mary by Charles, as her attorney in fact, who, in executing them, *assumed* to be authorized to execute them under the power of attorney, is not a finding of fact in a judicial sense. It is merely the expression of what appears on the face of the note and of the mortgage, as described in the pleadings. What appears needed no finding. The issue joined was, whether the signature of Mary to the note and the execution of the note and mortgage were acts authorized to be done for her, and in her name, by her son, as her authorized agent and attorney in fact. To say that he *assumed and claimed* to act for her is an equivocal finding as to authority to do the acts which were done upon that assumption.

The finding that the money was borrowed for the use and benefit of Mary, and not for the individual purposes of Charles, is not sustained by the evidence.

Upon that issue the evidence consisted of the testimony of Charles and of the attorney for the plaintiff. The first testified: "I borrowed the sum of fifty-seven thousand five hundred dollars for my sole use and benefit. Of it fifty thousand two hundred and forty-three dollars and ninety cents were paid to take up prior mortgages made by me upon my own property to the French Savings Bank. * * * The amount of those mortgages was paid by plaintiff's attorney in a check to the French Savings Bank. * * * The balance I received and used for my own personal expenses. * * * My mother had no interest in the fifty-seven thousand five hundred dollars so borrowed by me."

To this testimony there was no counter evidence. In his testimony the attorney of the plaintiff admits that Charles, to whom the loan was made, borrowed the money to pay off his indebtedness to the French Bank. He says: "He (Charles) told me that he was going to use part of it, as I remember now, to pay off a debt that was due to the French Bank, and the balance he was going to use in connection with other business; and inasmuch as there would be a surplus after paying the French Bank of about seven thousand dollars, why, it would come very near being the exact amount for which Mrs. Moore's lot was taken as security, and which, *I may have supposed at the time*, she was going to use." In addition he showed that, at the time of the transaction, he made the following memor-

anda upon Charles' application for the loan, viz.: "Amount of loan finally granted by the board, fifty-seven thousand five hundred dollars, February 1, 1878. Deduct for check fifty thousand two hundred and forty-three dollars and ninety-one cents, February 16, 1878. Pay bal."; and that upon those memoranda the money was in fact paid out for and on account of said Charles.

Knowing that the money borrowed by the defendant, Charles, was for his individual purposes, the plaintiff must have known that the act was not within the scope of the power of attorney from his mother, for which he could legally bind her: Sections 2,319, 2,315, 2,019, civil code.

The decree against the defendant, Mary A. Moore, and the order denying her motion for a new trial are reversed, and the cause remanded for further proceedings.

MYRICK, J., MORRISON, C. J., and THORNTON, J., concurred.

No. 20,116.

PEOPLE v. STEVENS.

Department One. Filed November 27, 1886.

BURGLARY—EVIDENCE OF CONSPIRACY—ACTS OF CO-DEFENDANT.—In a prosecution for burglary, evidence that on the morning following the night when the burglary was alleged to have been committed, the defendant came into the store of the witness and endeavored to sell him articles similar to those claimed to have been stolen, and that, while the defendant was in the prosecution of that purpose, the witness looked out and saw the co-defendant standing outside, is not sufficient to establish, *prima facie*, a conspiracy between the co-defendants, nor is it proper testimony to go to the jury as tending to establish such fact. And the fact that, many days after the alleged burglary, the co-defendants were seen conversing together, is not evidence of such conspiracy.

EVIDENCE HELD TO SHOW THAT THE BURGLARY WAS COMMITTED in the night time.

APPEAL from a judgment of the superior court of the city and county of San Francisco, entered upon a verdict convicting the defendant, and from an order denying him a new trial. The opinion states the facts.

John D. Whaley, for the appellant.

E. C. Marshall, attorney general, for the respondent.

FOOTE, C. The defendant was convicted of burglary in the first degree. A motion for a new trial was made and denied. From the order made in the premises and the judgment of conviction this appeal was taken.

It is urged that error was committed in admitting the evidence of a witness, Parrott, with reference to the acts of one Harrigan, who had been indicted jointly with defendant, but as to whom, on the trial, a severance was had.

One Cohen had previously testified that the defendant, on the morning following the night when the burglary with intent to commit larceny was alleged to have been committed, had entered his store and endeavored to sell him boots similar to those claimed to

have been stolen, and that while the defendant was in the prosecution of that purpose he, Cohen, looked out and saw Harrigan standing outside.

The question asked Parrott against the objection of the defendant was:

"Q.—Did you see Mike Harrigan and any one else on the evening of December 31, 1884, in the neighborhood of Joseph Gutberlet's store; state what you saw?"

To which the following reply was given, also against the defendant's objection:

"A.—On the evening of December 31, 1884, at about eight o'clock P. M., I saw a man named Harrigan and two others, who I don't know, looking in the window of Joseph Gutberlet's store, and when they saw me coming they ran away."

The judge who presided on the trial, evidently must have concluded, that by the testimony of Cohen, a sufficient foundation was laid to establish *prima facie*, the fact of conspiracy between the defendant and Harrigan, or that it was proper testimony to be laid before the jury as tending to establish such fact. In this we cannot concur.

Suppose a thief to be selling a stolen watch at a jewelry store, anywhere in the crowded city of San Francisco, on some public thoroughfare; would the mere fact that any respectable citizen stood on the outside, and the proprietor of the store observed him there, tend to prove any conspiracy between him and the thief in the commission of a burglary the night before, when the watch was stolen? And yet the evidence as to a conspiracy between the defendant and Harrigan, as given by Cohen, was no stronger than the incident above supposd.

Nor is there anything else in the evidence which tends more strongly to show a conspiracy between those parties. The statement of Parrott as to his having seen them days after the burglary, conversing, as he supposed by the motions of their hands and heads, would only tend to impeach the defendant's statement that he did not know Harrigan.

Nor can we say from the record that the admission of this testimony on the part of Parrott, first discussed, did not injure the defendant's cause before the jury.

The law upon the question of conspiracy, and the consideration which the jury should give to what might, or what might not, be evidence on the same, was well stated: People v. Geiger, 49 Cal., 643, 649.

And, taking the whole charge of the court in its entirety, and giving to it a fair and unstrained interpretation, it announced the law applicable to the case fully and plainly.

It is urged by the defendant that there was no proof that the alleged offense was committed in the night time. From the evidence, the breaking and larceny must have occurred between the hour of eight o'clock, on the evening of the thirty-first of Decem-

ber, 1884, and the same hour on the morning of the first of January, 1885. On the latter day the sun rose at twenty-five minutes past seven o'clock. There was not the least scintilla of proof that the crime was committed in the thirty-five minutes that intervened from that time, until that when the proprietor of the store discovered the burglary had been commited. On the other hand, all the evidence, both positive and circumstantial, tended to show its being done on the night before, as charged.

The judgment and order should be reversed and a new trial granted.

BELCHER, C. C., and SEARLS, C., concurred.

BY THE COURT. For the reasons given in the foregoing opinion, the judgment and order are reversed and cause remanded for a new trial.

No. 8,391.

BARROILHET v. ANSPACHER ET AL.

Department One. Filed November 27, 1885.

SHERIFF'S SALE—STATUTE OF LIMITATIONS AGAINST PURCHASER.—A sale of real estate under execution took place on November 22, 1875. The purchaser became entitled to a sheriff's deed on May 23, 1875. *Held*, that an action of ejectment commenced by one claiming under him, on April 18, 1881, was not barred by the statute of limitations; and this, whether the statute commenced to run as soon as the deed might have been made to the purchaser, or not until it was actually made and delivered.

TRUST—TRANSFER OF REAL PROPERTY—CONSIDERATION PAID FOR ANOTHER.—Under section 853 of the civil code, where a transfer of real property is made to one person, and the consideration thereof is paid *for* another, a trust is presumed to result in favor of the person for whom the consideration is paid. It is not necessary that the consideration should have been paid *by* him.

THE SAME—CESTUI QUE TRUST IN POSSESSION—LACHES.—Such *cestui que trust*, while in possession, is not guilty of laches in not asserting his rights, against the holder of the legal title out of possession.

APPEAL from a judgment of the superior court of Alameda county, entered in favor of the plaintiff, and from an order denying the defendants a new trial. The opinion states the facts.

J. M. Rothschild and *J. E. McElrath*, for the appellants.

Curtis H. Lindley, for the respondent.

BELCHER, C. C. This is an action to quiet title to a block of land known as block No. 5, in the town of Livermore, in Alameda county.

By their answer the defendants set up the statute of limitations, and then certain facts under which they claimed that the plaintiff held the title to the land in trust for them.

The case was tried and judgment rendered in favor of the plaintiff, and the appeal is from that judgment and an order denying a motion for a new trial.

The facts out of which the case arose are as follows: In March, 1875, A. D. Splivalo owned this block No. 5 and other parcels of land in Alameda county. E. M. Derby had a judgment against Splivalo for three hundred and forty-seven dollars and thirty cents, which was a lien upon all such lands.

The defendants, Philip and Simon Anspacher, wished to purchase block No. 5 for one thousand eight hundred dollars, but desired that it should be first released from the lien of this judgment. Thereupon Splivalo, the Anspachers, Derby and E. B. Mastick, his attorney, had a conference, at which Derby verbally agreed to release block No. 5 from the lien of his judgment upon the payment to him of one hundred and fifty dollars. The Anspachers then paid Splivalo the purchase price of the block—one thousand eight hundred dollars—took a deed of it, dated March 17, 1875, and at once went into possession, and have been in possession of it ever since. Splivalo afterwards paid Derby the one hundred and fifty dollars, but instead of releasing the block from the lien, he simply credited the money upon his judgment.

In August, 1875, an execution was issued on the judgment, and on the twenty-second day of November following, the block in question and eight other blocks of land in the town of Livermore, were sold thereunder and bid in by Derby in satisfaction of the amount still remaining due on his judgment.

In May, 1876, just before the time for redemption expired, Splivalo, Anspacher, Pardini, who was interested in one of the blocks sold, and Derby, met at Mastick's office to discuss the situation. It was found that the amount of money necessary to redeem all the property sold was four hundred and twelve dollars, and it was agreed that Anspacher's block, No. 5, Pardini's block, and one or two other blocks should be redeemed or released from the sale. As the most convenient way of effecting this release it was suggested that the title to all the property sold be put in the name of the plaintiff, and that he then make the deeds of release. This was agreed to, and thereupon Splivalo and Mastick went to see the plaintiff about it. Splivalo informed the plaintiff how they proposed to put the title to the property in his name, how many blocks had been sold, and that block No. 5 and three other blocks were to be deeded over by him to the parties to whom they really belonged and whose names were given to him. The plaintiff replied, "Do whatever you please," and then agreed to deed the blocks over as requested. After this interview, and on the twenty-seventh day of May, Splivalo drew his check for four hundred and twelve dollars on the plaintiff, who was a banker, and with whom he already had an overdrawn account, and then went with the check to the plaintiff's bank, and drew the money on it, the money so drawn being charged up to his account. Splivalo then went back to Mastick's office and paid him the four hundred and twelve dollars, and took from him a receipt reading as follows:

"E. M. DERBY v. A. D. SPLIVALO.

"$412. Received of A. D. Splivalo, $412, in full for redemption of land sold under execution, issued in the above-entitled case.

"(Signed.) E. B. and J. W. MASTICK,
"Attorneys for E. M. Derby.

"Dated May 27, 1876."

Mastick immediately paid the money over to Derby.

Splivalo testified: "I paid the money just before the time for redemption expired, but it was not to redeem. It was for the purpose of getting an assignment of all the property in the name of Barroilhet, who owned all the other blocks in dispute. The assignment was not made on that day, because Derby was not there, and the thing went on until sixth of February, 1877. * * * Then I went to Mastick, and Mr. Mastick had the certificate. He wrote the assignment on the back of the certificate. Mr. Derby was sent for and signed the assignment to Barroilhet. It was acknowledged * * and then my clerk came to Oakland and got the sheriff's deed, and immediately thereafter Mr. Pardini requested Barroilhet for a deed to block 31, and Barroilhet made it. The others were not requested and they remained so. * * * * * * * * I had no convertion with Barroilhet when the deed was made. The deed was delivered to Barroilhet; the certificate never was. * * * * * * The money was my money. I borrowed it from Mr. Barroilhet on my open account."

Mastick testified: "I went with Splivalo and called upon Mr. Barroilhet, and he said whatever we did was all satisfactory to him. He turned the matter over to Mr. Splivalo to give directions. * * * The distinct understanding was that these people were to be protected. * * * Anspacher was to be protected—I mean freed from the lien or freed from the sale. * * *

"Q.—Is your recollection clear that you gave this redemption receipt to Splivalo?

"A.—I know it was; I am as certain about it as anything; I know that I actually gave this, and it brings to my mind distinctly that all this time I regarded this property as redeemed property * * * and I know it was at that time intended as a redemption. I admit that it was not exactly a good way to do it, to make an assignment of the certificate, but it was done with the expectation that all these people were to be protected and none to be harmed by it, and nothing was paid for it at all. * * *

"Q.—Mr. Mastick, did Mr. Barroilhet pay anything for that certificate?

"A.—Not at all; he paid nothing. When the assignment was made and the money was paid for the redemption and the receipt given; it was bought in by Splivalo and paid by him."

Upon the facts of the case the court below was of the opinion that the plaintiff is the owner in fee simple and entitled to the possession of the premises in controversy; that no trust exists in favor of the defendants in the property, and that the plaintiff holds the legal title free from any equitable claim whatever on the part of the defendants.

1. The sale under the execution took place on the twenty-second day of November, 1875, and the purchaser was not entitled to a sheriff's deed until the twenty-third day of May, 1876. This action was commenced on the eighteenth day of April, 1881, and the action

was therefore not barred by the statute of limitations, and this is so whether the statute commenced to run as soon as the deed might have been made to the purchaser, or not till it was actually made and delivered to the plaintiff: Jefferson v. Wendt, 51 Cal., 573; Pratt v. Pratt, 96 U. S., 704.

2. Our civil code provides as follows: "Section 853. When a transfer of real property is made to one person, and the consideration thereof is paid by or for another, a trust is presumed to result in favor of the person by or for whom such payment is made."

It is claimed for respondent, that when the title to the block of land in controversy was transferred by the sheriff's deed to him, no trust resulted in favor of the appellants, because the consideration for the transfer was not paid by *them*. But in order that a trust might result in their favor it was not necessary that the consideration for the transfer should have been paid *by* them. It was enough if it was paid *for* them.

That the consideration for the transfer of this block No. 5 was paid for the appellants is clear from the evidence, and there is no conflict. First, the one hundred and fifty dollars was paid by Splivalo to release this block from the lien of the judgment, and this was done *for* the appellants. Second, the four hundred and twelve dollars was paid by Splivalo to place the title to this block in the name of the respondent *for* the appellants. And when the respondent received his deed, he knew that the consideration for the transfer to him had been paid by Splivalo for the appellants and that he had agreed to accept the title and hold it for them.

We think it clear, therefore, that when the respondent accepted the sheriff's deed he took the title to the block of land in controversy in trust for the appellants.

It is urged further that the appellants were guilty of laches in asserting their rights, and therefore the trust cannot be enforced in their favor. But this position cannot be maintained. They were in possession of the property and owned the entire beneficial interest therein. The respondent was out of possession and held the naked legal title for them. They might safely rest content therefore until he took some steps to disturb them in their rights.

It follows that the judgment and order should be reversed and the cause remanded for a new trial.

SEARLS, C., and FOOTE, C., concurred.

BY THE COURT. For the reasons given in the foregoing opinion, the judgment and order are reversed and cause remanded for a new trial.

No. 8,703.

MARKS v. BODIE BANK.

Department One. Filed November 30, 1885.

BANK FOR COLLECTION—LIABILITY TO ACCOUNT—CASE IN JUDGMENT.—The plaintiff assigned certain notes to the defendant for collection, from one C. the maker, under an agreement that the defendant would use its best efforts to collect the same, and when collected to pay the proceeds thereof over to the plaintiff, deducting costs and expenses of collecting. The defendant immediately commenced an action against C. on the notes, and on an indebtedness due to it. Judgment was obtained against C., and under the execution there was sold a large lot of clothing, merchandise, etc., the property of C., which was bid in by the defendant, for a sum sufficient to satisfy the execution, for the benefit of itself and the plaintiff, in order to prevent a sacrifice of the goods. The defendant afterwards sold the goods, but not for enough to satisfy the plaintiff's demand, after paying its own debt and the costs and expenses. *Held*, that neither the plaintiff or defendant was entitled to payment in full out of the proceeds of the sale; that they were each entitled to share in the proportion in which their claims against C. had paid the purchase price; and that the plaintiff became entitled to his share thereof, after sale, upon demand.

INCOMPETENT EVIDENCE MUST BE OBJECTED TO.—A refusal to strike out evidence on the ground that it was incompetent and immaterial, is not error if the same was given without objection on this ground.

APPEAL from a judgment of the superior court of Mono county, entered in favor of the defendant, and from an order denying the plaintiff a new trial. The opinion states the facts.

F. V. Drake, Marcus Rosenthal and *Kittrell & Owen*, for the appellant.

Bennett & Reddy, for the respondent.

BELCHER, C. C. This is an action to recover the sum of one thousand five hundred and fifty dollars, besides interest thereon, which, it is alleged, the defendant had collected, and now holds for the use of the plaintiff.

From the findings it appears that the plaintiff was the owner of three promissory notes made by one Jonas Cohn, on which there was due for principal the sum of one thousand five hundred and fifty dollars, and that on the twelfth day of May, 1880, he assigned the notes to the defendant for collection, "the defendant then and there agreeing with the plaintiff to use its best efforts to collect the same, and when collected to pay the proceeds thereof over to the plaintiff, deducting therefrom the necessary costs, commissions and expenses incident to such collection;" that the defendant at once commenced an action to recover the amount due for principal and interest on the notes and the further sum of eight hundred and four dollars and sixty-one cents, which Cohn then owed to defendant; that judgment was obtained for the full amount claimed, on which execution was issued; that under the execution there was sold a large lot of clothing, merchandise and book accounts, the property of Cohn, which was bid in by the defendant for a sum sufficient to satisfy the execution and pay the costs of sale.

The court further found that the defendant did not purchase the goods, merchandise and book accounts, at the sheriff's sale for its own sole benefit; but, there being no bidders who were willing to pay therefor a sum sufficient to satisfy the execution, the defend-

ant bid the same in for the use and benefit of the plaintiff and defendant, in order to prevent a sacrifice of the goods and to secure the demands of both parties; that for want of a purchaser willing to pay a fair price for the goods, or sufficient to satisfy the plaintiff's and defendant's demands in full, only a small portion thereof had been sold by defendant, and that after applying the proceeds of the sales to the costs and expenses of the suit and sale, and the expenses of taking care of and disposing of the goods, a portion of the defendant's demand still remained due and unpaid.

It was further found as a conclusion that the defendant had no money in its possession belonging to the plaintiff, and was, consequently, entitled to have judgment entered in his favor.

The appeal is by the plaintiff from the judgment and an order denying his motion for a new trial.

1. It was claimed for the plaintiff at the trial, and is claimed here, that the defendant had no authority to bid in the goods on his account or for his benefit, and that having bid them in in its own name for a sum sufficient to satisfy the execution, it at once became liable to pay him the amount due on his notes for principal and interest. We do not think this claim can be maintained. The notes were turned over to the defendant for collection, and it became its duty to exercise care and diligence in trying to make the full amount of money due on them. The plaintiff estimated the value of the goods seized at considerably more than enough to satisfy the execution. When they were offered for sale, therefore, there being no other bidders willing to take them at a price which would satisfy the execution, it appeared to be for the interest of both parties that they be bid in on their joint account, and held till they could be sold so as to make the full amount of money to which each was entitled.

Looking at all the testimony, and the circumstances surrounding the transaction, we think it may fairly be concluded that the defendant was authorized to bid in the goods for the use and benefit of both parties, and that the court rightly found that it did so bid them in.

It is further claimed for the plaintiff that the court erred in refusing to strike out the testimony of the witness William Irwin, on the ground that it was incompetent and immaterial. The testimony was given without objection on this ground, and the motion to strike out came too late: People v. Long, 43 Cal., 444; People v. Rolfe, 61 Cal., 540.

2. It was claimed by the defendant, in its answer, that, under the agreement made between the parties, whenever any money should be collected, by any means, in consequence of the action, it was to be applied, first to the payment of the costs and expenses incurred in the action, including the attorney's fee. Second, to the payment of Cohn's indebtedness to the defendant, and third, if there should be any overplus, to the payment of the amount due on the notes of the plaintiff.

There was nothing in the evidence to justify this claim. No such agreement was proved, and none could be inferred from the circum-

stances attending the transaction. On the contraay, we must presume that when the property was bid in for the use and benefit of both plaintiff and defendant, they became interested in it, and were entitled to share in its proceeds in the proportions in which their claims against Cohn had paid its purchase price.

The title to the whole property was taken in the name of the defendant, but to the extent of plaintiff's interest it was held in trust for him.

It follows that when any of the goods were sold, the plaintiff was entitled to demand and receive from the defendant his *pro rata* share, after paying costs and expenses, of the moneys for which they were sold.

The case shows that when this action was commenced, some of the goods had been sold, and the proceeds of the sale were in possession of the defendant. The plaintiff's share of the proceeds should have been paid to him on his demand, and may be recovered in this action.

The judgment and order should, therefore, be reversed and the cause remanded for a new trial.

SEARLS, C., and FOOTE, C., concurred.

BY THE COURT. For the reasons given in the foregoing opinion, the judgment and order are reversed, and cause remanded for a new trial.

No. 9,359.

GONZALES ET AL. *v.* COBLINER ET AL.

In Bank. Filed November 30, 1885.

WHERE THE EVIDENCE IS CONFLICTING THE JUDGMENT WILL NOT BE REVERSED on the ground that it was insufficient to justify the verdict.

MALICIOUS PROSECUTION OF CIVIL ACTION—MALICE ESSENTIAL.—In an action to recover damages for the malicious prosecution of a civil action, the existence of malice is essential to a recovery, consequently it is error to refuse to instruct the jury "that if the defendants instituted suit against plaintiffs in good faith without malice and with no other motive than to recover a debt which they honestly believed were due by plaintiffs, then plaintiffs cannot recover."

APPEAL from a judgment of the superior court of the city and county of San Francisco, entered in favor of the plaintiffs, and from an order denying the defendants a new trial. The opinion states the facts.

Marcus Rosenthal and *W. H. Sharp*, for the appellants.

Fox & Kellogg, for the respondents.

BELCHER, C. C. This is an action to recover damages for the malicious prosecution of a civil action against the plaintiffs.

It is alleged in the complaint that on the twelfth day of January, 1881, the defendants, not then having any reasonable or probable cause of action against the plaintiffs, or either of them, maliciously, and intending to harass, oppress and injure the plaintiffs in their business, good name and credit, commenced an action in a justice's

court to recover from the plaintiffs the sum of two hundred and ninety-nine dollars and fifty cents for goods sold and delivered; that a writ of attachment was taken out at the same time and served by attaching certain moneys due the plaintiffs; that on the twenty-first day of the same month, the attachment was discharged and the moneys held thereunder released, upon the ground that the accounts sued on were not due when the suit was commenced; that thereupon the plaintiffs in said action voluntarily dismissed and discontinued the same; that at the time of the issuance of the attachment the plaintiffs were engaged in manufacturing and selling neck-wear in the city of San Francisco, and that, by reason of the suit and attachment, they were greatly injured in their credit and business, and suffered great pain of mind; that the plaintiffs were forced to expend, and did expend, the sum of seventy-six dollars in defense of the action and in procuring a dissolution of the attachment, and that they were otherwise damaged thereby in the sum of five thousand dollars, for which they asked judgment.

There was a general demurrer to the complaint, which was properly overruled.

By their answer, the defendants admitted that the proceedings in the justice's court were commenced and ended as alleged in the complaint, but they denied that in commencing the action and taking out the writ of attachment, they acted maliciously or without reasonable and probable cause. On the contrary, they alleged that they acted in good faith, and that before commencing the action they stated all the facts and circumstances connected with the transaction, fully, fairly and truthfully, to an attorney, who was admitted to practice law in all the courts of this state, and that after such statement they were advised by him, and verily believed, that they had good and present causes of action against the plaintiffs herein, and full right to take out and have levied upon their property a writ of attachment; that, having full faith in, and acting upon the advice of, their attorney, they commenced and prosecuted the action complained of.

They also denied that by reason of the action the plaintiffs suffered pain of mind, or were injured in their business or credit, or were in any way damaged in the sum of five thousand dollars or in any other sum.

Upon the issues thus raised the case was tried before a jury, and very direct and positive testimony was introduced to sustain the contention of each side. The verdict was in favor of the plaintiffs, and the appeal is by the defendants from the judgment and an order denying a new trial.

First—The evidence was conflicting, and we cannot reverse the judgment on the ground that it was insufficient to justify the verdict.

Second—The court instructed the jury very clearly and fully upon most of the questions involved in the case, and no exception was taken by the defendants to any of the instructions given; but it refused to instruct them, at the request of defendants, as follows:

"4th—If the defendants instituted suit in the justice's court against plaintiffs in good faith, without malice, and with no other motive than to recover a debt which they honestly believed was due by plaintiffs, then plaintiffs cannot recover in this action, and your verdict must be for defendants."

The defendants excepted to this refusal, and now assign it as error.

We think the instruction should have been given. It was not refused because it had been substantially embraced in the charge given by the court, nor do we think it could rightfully have been refused for that reason.

The proposition involved in the instruction asked is settled law. The authorities in support of it are numerous, but only a few need be cited.

Speaking of an action for malicious prosecution, this court has said:

"Malice in fact must be shown in order to support the action, * * * and while the jury *may* find the fact of malice from the circumstances of the want of probable cause, or from other circumstances established in the case, they are not to be told that a wrongful charge made without probable cause is *per se* malicious in fact:" Harkrader v. Moore, 44 Cal., 153.

The supreme court of Alabama reversed a judgment because the court below refused to instruct the jury "that if the defendants did not sue out the attachment with malice, or from a disposition to vex or harass the plaintiff, but honestly believed that they had reasonable and probable cause to sue out the attachment, then the plaintiff was not entitled to recover:" Benson & Co. v. McCoy, 36 Ala., 710.

In Massachusetts it has been held that "no action lies for one whose property has been attached, and who has suffered much damage in consequence of a civil suit, which was abated, unless the prosecution of such suit were malicious:" Lindsay v. Larned, 17 Mass., 190.

In an action for malicious prosecution, the supreme court of the United States used the following language:

"It is abundantly settled that no suit can be maintained against an unsuccessful plaintiff or prosecutor, unless it is shown affirmatively that he was actuated in his conduct by malice, or some improper or sinister motive. Malice is essential to the maintenance of any such action and not merely to the recovery of exemplary damages. * * *

"In Farmer v. Darling, 4 Burr., 1,791, one of the earliest reported cases, if not the earliest, Lord Mansfield instructed the jury that the 'foundation of the action was malice,' and all the judges concurred that 'malice, either express or implied, and the want of probable cause, must both concur.'

"From 1766 to the present day, such has been constantly held to be the law, both in England and this country. See a multitude

of cases collected in volume 8 U. S. Digest, first series, 942 Pt. 95. And the existence of malice is always a question exclusively for the jury. It must be found by them, or the action cannot be sustained. Hence it must always be submitted to them to find whether it existed. The court has no right to find it, nor to instruct a jury that they may return a verdict for the plaintiff without it. Even the inference of malice from the want of probable cause is one which the jury alone can draw;" citing a large number of cases: Stewart v. Sonneborn, 98 U. S., 192.

It follows that the judgment and order should be reversed and the cause remanded for a new trial.

SEARLS, C., and FOOTE, C., concurred.

BY THE COURT. For the reasons given in the foregoing opinion, the judgment and order are reversed and the cause remanded for a new trial.

MYRICK, J., DISSENTING. I think the instruction was substantially given. I therefore dissent from the judgment.

No. 9,452.

MOORE *v.* CLEAR LAKE WATER WORKS.

In Bank. Filed November 30, 1885.

INJUNCTION—DIVERSION OF WATER—RIGHTS OF APPROPRIATOR—ALLEGATIONS OF COMPLAINT.—In an action by an appropriator of the waters of a natural stream, to restrain an unlawful diversion thereof, the complaint need not show that the plaintiff is in a position to use the water himself, or that he is in any position which gives him a right to furnish it to others. An allegation that he has a right to the use and enjoyment of the property is sufficient.

THE SAME—EQUITY WILL RESTRAIN CONTINUOUS DIVERSION.—Equity will restrain the continuous wrongful diversion of water, at the instance of a prior appropriator thereof, although no actual damages are averred or proved. Equitable relief is granted, in such cases, to prevent the wrongful acts from ripening into a right.

FINDINGS—SUFFICIENCY OF.—A finding that "all the allegations of the complaint herein are true," etc., and that "all the allegations of the answer herein are untrue," is sufficient.

APPEAL from a judgment of the superior court of Yolo county, entered in favor of the plaintiff. The opinion states the facts. The opinion in department is reported in 5 West Coast Rep., 177.

Fox & Kellogg, for the appellant.

W. B. Treadwell, F. E. Baker and *Wallace, Greathouse & Blanding*, for the respondent.

MORRISON, C. J. This case comes before us on the judgment roll alone and the principal points are as to the sufficiency of the complaint and findings to support the judgment. The alleged cause of complaint is the diversion of water by defendant from plaintiff's ditch from a stream known as Cache creek, in the county of Yolo. There are two counts in the complaint; the first of which alleges "that the plaintiff is the owner and in the possession of a certain

water ditch in said Yolo county, generally known and called the Woodland or Moore's ditch, which commences and heads in a natural watercourse or stream flowing through said county, well known as 'Cache creek,' at a point in said creek near the northeast corner of the lands belonging to the estate of W. J. Campbell, deceased, and runs thence in a general easterly course about two and one-half miles to a point where it branches or forks, one branch or fork thereof running thence in a general southeasterly direction about five miles, and the other branch or fork running from said point in a general northeasterly course about two and one-half miles.

"That said ditch, during all the times hereinafter mentioned, had the capacity to carry one hundred and eighty cubic feet of water, running and flowing at the velocity of four feet per second; and that plaintiff, and his grantors and predecessors in interest, have been the owners of and in the possession of said ditch, and using and operating the same for more than ten years next before the commencement of this action.

"Plaintiff further alleges that he is the owner of certain water rights, viz.: the right to appropriate and take out from the waters of said Cache creek, flowing naturally therein at the head of said ditch, so much water as said ditch has the capacity to carry as aforesaid, and to divert the same into and through said ditch, and to use said water and furnish the same to others, to be used for domestic, stock and agricultural purposes; and that he and his grantors and predecessors in interest have been the owners of such water rights continuously for more than ten years next before the commencement of this action, and have, during said time, except when such rights were interrupted by defendant, as hereinafter stated, been in the uninterrupted use and possession of such water, and diverted the same at said point, and used and furnished the same to others to be used for domestic, stock and agricultural purposes.

"Plaintiff further alleges that said defendant, by means of a dam erected and constructed across and from the side of said Cache creek at a point on said creek about thirty miles above the head of plaintiff's said ditch, is now taking and at divers times during the past three years has taken and diverted and appropriated to its own use the waters of said creek, which said plaintiff and his predecessors were entitled to have flow down the channel of said creek to and into the head of plaintiff's said ditch and through the same as aforesaid, and has, during the times last aforesaid deprived, and is depriving the plaintiff of such water, and thereby prevented plaintiff from receiving into his said ditch the waters of Cache creek, which said plaintiff and his predecessors were all the time hereinbefore mentioned entitled to have flow down said creek and into his ditch as aforesaid.

"That defendant claims that it has the right to take out and divert said water and prevent the same from flowing dow
nel of said creek and into and through plaintiff's said ditch and the

right to deprive plaintiff of said water, but plaintiff alleges that such taking, appropriation and diversion of the waters of said creek, by the defendant, as aforesaid, is unlawful and wholly without right, and in violation of the rights of plaintiff, to the great and irreparable injury and damage of plaintiff, and plaintiff alleges that said water so diverted by defendants as aforesaid and prevented from flowing down said creek and into plaintiff's said ditch, as it of right ought to flow, is of great value, viz., of the value of four dollars per foot for twenty-four hours; and that plaintiff has been and is greatly damaged by said diversion.

"Plaintiff further alleges, that said ditch of defendant is a permanent ditch, and that defendant intends and threatens to continue to divert said water as aforesaid and will permanently divert the same and prevent it from flowing into plaintiff's said ditch where of right it ought to flow, if not restrained by this court, and that said acts and threatened acts of defendant will cause great and irreparable injury to plaintiff if not prevented by a decree of this court enjoining the same."

To this count there was a general demurrer that the complaint did not contain facts sufficient to constitute a cause of action, which was overruled by the court below, and here the point is made that the count fails to show that the plaintiff is in a position to use the water himself, or that he is in any position which gives him a right to furnish the water to others.

The allegation of these matters is not essential to plaintiff's right of action. If he has a *right* to the use and enjoyment of the property, that is sufficient to have his right protected against invasion by another, and his ownership of the property carries with it the right to any lawful enjoyment of it, either by using it himself or disposing of it to others.

Another point is that there is a perfect remedy at law, therefore, injunction will not lie, and in support of this proposition the learned counsel cites Richards v. Kirkpatrick and another, 53 Cal., 433. It is true, as held in that case, that a party is not entitled to an injunction in a case where he has a plain, speedy and adequate remedy at law, but that is not this case. Here the plaintiff complains of a continuous wrongful act and consequent infringement of his rights, and therefore prays for an injunction to stay such continuous injury, and it is only in a court of equity and by means of an injunction that an adequate remedy can be had. And it was not necessary for the plaintiff to aver or prove actual damages. The interposition of a court of equity was required to prevent defendant's wrongful acts from ripening into a right, and on that ground alone the interference of a court of equity was properly asked and granted: Webb v. Portland Manufacturing Company, 3 Sumner, 189.

But the allegations in the complaint showing an injury inflicted by defendant upon the rights of the plaintiff are sufficient: 2 Chitty on Pleadings, 790-2-4; Lorenz v. Jacobs, 2 West Coast Rep., 722.

Although not sufficiently definite in its terms the complaint was not obnoxious to a general demurrer and the demurrer, on the sole ground that the complaint did not state facts sufficient to constitute a cause of action, was properly overruled.

What we have said with reference to the first count in the complaint applies with equal force to the second. The findings are that "all the allegations of the complaint herein are true except that the capacity of the ditch of the plaintiff therein described is four hundred and thirty-two cubic feet of water per second.

"2. That all the allegations of the answer herein are untrue."

These finding were sufficient: Pralus v. Pacific G. & S. M. Co., 35 Cal., 30; Carey v. Brown, 58 Cal., 180.

Judgment affirmed.

THORNTON, J., MCKEE, J. and MYRICK, J., concurred.

No. 8,948.

CRESCENT MILL AND TRANSPORTATION CO. v. HAYES ET AL.

In Bank. Filed November 30, 1885.

INJUNCTION—DESTRUCTION OF NAVIGABLE LAKE — SPECIAL INJURY.—One who is, and for many years has been, the owner of a lumber mill upon the banks of a navigable lake, which it is necessary for him to use in transporting logs to his mill, is specially injured by a destruction of the navigation of such lake, and may maintain, in his own name, an action to restrain the injury.

APPEAL from a judgment of the superior court of Del Norte county, entered in favor of the plaintiff. The opinion states the facts. The opinion in department is reported in 6 West Coast Rep., 131.

W. A. Hamilton, J. J. De Haven and *J. D. H. Chamberlain* for the appellants.

R. G. Knox and *L. F. Cooper*, for the respondent.

THORNTON, J. This is an action to enjoin defendants from interfering in the navigability of Lake Earl, which has been by an act of the legislature, approved February 4, 1874, declared navigable. The lake is averred to be in fact navigable.

It is contended that the contemplated interference would be a public injury; that the complaint does not show any special injury to the plaintiff, and, therefore, it cannot maintain the action. In this contention we cannot concur.

It is averred in the complaint that the plaintiff is the owner, and in possession of a mill, situate on Lake Earl, that it has been such owner, and so possessed of this mill for thirteen years next last past, that plaintiff's business is the manufacture of lumber for sale at this mill, it is necessary that plaintiff should use said lake in transporting the saw logs, cut from its lands, to said mill, and that what defendants threaten to do will destroy the navigation of said

lake, so that the logs cannot be transported to said mill. We think that the above averments show a special injury to the plaintiff.

The defenses set up in the answer were demurred to and the demurrer was sustained. On examination of the answer we are of opinion that the court committed no error in its ruling.

The court finds that all the allegations in the complaint were true.

There is no error in the record.

Judgment affirmed.

MORRISON, C. J., ROSS, J., and SHARPSTEIN, J., concurred.

No. 8,298.

GRAVES ET AL. *v.* BAKER.

Department Two. Filed November 30, 1886.

DECLARATION OF HOMESTEAD BY WIFE—SUBSEQUENT TRUST DEED BY HUSBAND IS VOID.—A trust deed, executed and acknowledged by a husband alone, to his wife, is void, as against a prior declaration of homestead, made by the wife, on the property. Under section 1,243 of the civil code, such homestead could be abandoned only by a declaration or a grant executed and acknowledged by the husband and wife.

APPEAL from a judgment of the superior court of San Luis Obispo county, entered in favor of the plaintiffs, and from an order denying the defendant a new trial. The opinion states the facts.

W. J. & Wm. Graves, McD. R. Venable, Ernest Graves and *Craig & Meredith*, for the appellant.

Gregory & Shipsey, for the respondents.

FOOTE, C. Action to declare a trust under the provisions of a deed made by Crogan Graves to Miriam Graves, his wife. The trust deed was of property on which a homestead had been declared by Miriam, the wife of Crogan Graves, before the trust deed was executed and delivered. The declaration of homestead was offered in evidence with a view to defeat this trust deed. It was excluded by the court.

This declaration of homestead has been before this court in the case of Steiner v. Graves *et al.*, No. 5,276, and, as we understand, it has been declared valid. See Ham v. Santa Rosa Bank, 62 Cal., 125. Therefore, it could only be abandoned by "a declaration or a grant thereof executed and acknowledged" by Crogan Graves and Miriam Graces, his wife: Sec. 1,243, C. C. The trust deed was executed and acknowledged by Crogan Graves alone, hence as against a valid declaration of homestead it was void. The court below, in refusing to admit in evidence this declaration of homestead, committed error and its judgment should be reversed.

SEARLS, C., and BELCHER, C. C., concurred.

BY THE COURT. For the reasons given in the foregoing opinion, the judgment is reversed and cause remanded.

No. 8,187, 8,904.

MYERS v. McDONALD ET AL.

In Bank. Filed November 30, 1885.

REVERSAL OF JUDGMENT—RETRIAL, WHEN MUST BE HAD.—When the supreme court reverses a judgment, on motion of respondent, and orders that judgment "be and the same is hereby reversed, with costs, and cause remanded," the parties to the action have a right to a retrial of the issues, unless there is something in the opinion of the court or the order made by it, restricting the operation of the words "reversed and remanded." In such case it is error for the lower court to refuse a retrial.

BREACH OF CONTRACT—EVIDENCE OF CONSIDERATION.—Where a promise is made on consideration, *inter alia*, that the plaintiff would not become intoxicated in a certain place and during a certain period, evidence that the plaintiff became intoxicated is admissible, in an action by him to recover for breach of such promise.

PROCEEDING WITH TRIAL AFTER CONTINUANCE AS TO ONE DEFENDANT—WAIVER OF IRREGULARITY.—Proceeding with a trial as to one defendant, after a continuance has been granted as to another, conceding it to be error, cannot be taken advantage of by the adverse party, if he did not object to such mode of procedure before the trial was commenced.

FINDING—AMOUNT "DUE" MEANS OWING AND UNPAID.—Where issue is raised as to whether or not a promissory note had been paid, a finding that certain sums were "due" thereon, is equivalent to a finding that such sums are owing and unpaid.

APPEALS from judgments of the superior court of the city and county of San Francisco, entered in favor of the defendants. The opinion states the facts.

Wallace & Hastings, for the appellants.

S. S. Wright, for the respondent.

THORNTON, J. There are three appeals in this action—one from a judgment in favor of J. M. McDonald, another from an order refusing to set aside the judgment, No. 8,187, and another from a judgment in favor of M. L. McDonald.

The cause came on for trial by the court on the twenty-fifth of January, 1881. After hearing the evidence offered, the court ordered judgment in favor of J. M. McDonald, and postponed the further trial of the cause as between the plaintiff and M. L. McDonald until the twenty-fifth of July, 1881. On this latter date, the court below orally announced that judgment would be given in favor of M. L. McDonald, and directed findings to be prepared and submitted to the court. Before the findings were signed, the attorney for McDonald directed the clerk of the court to enter the judgment rendered in his favor, and such judgment was recorded on the seventh of October, 1881.

From this judgment the plaintiff prosecuted an appeal to this court. When this appeal was taken and perfected the findings had not been signed by the judge who tried the case, and findings had never been waived. In his bill of exceptions taken to be used on the appeal from this judgment, the plaintiff specified as the errors on which he would rely to reverse the judgment, the failure to sign and file findings of fact, and errors of law occurring at the trial in the rejection of evidence offered by plaintiff. The bill of exceptions just referred to was sufficient to bring these errors before the appellate court. M. L. McDonald afterwards moved the supreme court for leave to confess error, and for an order reversing the judg-

ment and remanding the cause for further proceedings. This motion was, on the thirteenth of March, 1882, granted, and the order was entered accordingly. The order entered was that the judgment "be and the same is hereby reversed with costs and cause remanded."

A remittitur containing this order was duly sent down to the lower court. On the filing of this remittitur in the court below, plaintiff moved that the cause be placed on the calendar for trial, as to the issues between plaintiff and M. L. McDonald. This motion was denied and plaintiff excepted.

The defendant, M. L. McDonald, moved the court below for leave to present findings of fact and conclusions of law on the trial of this action, for signature by the judge, and that judgment be entered thereon. This motion was granted, and plaintiff excepted. The court then proceeded to have findings filed and judgment entered on them in favor of M. L. McDonald.

In Stearns v. Aguirre, 7 Cal., 443, it was held that after the reversal of an erroneous judgment, the parties to the action have the same rights which they originally had. This rule was approved in Phelan v. San Francisco, 9 Cal., 16, and in Argenti v. San Francisco, 30 Cal., 459. In Ryan v. Tomlinson, 39 Cal., 639, where this court had rendered judgment in these words, "judgment reversed and cause remanded," and it was contended that such an order ended the case, so that it could not be retried, the court said: "There is no force in the suggestion that the decision of this court on the former appeal ended the case, so that it could not be retried. The other was 'judgment reversed and cause remanded.' Unless it was apparent from the opinion of the court that the adjudication was intended to be a final disposition of the cause, the effect of the reversal was only to set aside the judgment, that a new trial might be had. This point has been several times decided by this court." The court then cites Argenti v. San Francisco, Stearns v. Aguirre and Phelan v. San Francisco, *ut supra*, 39 Cal., 646. Substantially the same ruling was made in Irwin v. Towne, 43 Cal., 23, and Chandler v. Peoples' Savings Bank, 3 West Coast Rep., 523. See 2 Hayne on N. T. and App., 904–907. We understand that the above is the settled rule, unless there is something in the opinion of the court or the order made by it, restricting the operation of the words "reversed and remanded." In this case there was no opinion, and the order did not restrict the meaning of the words *reversed* and *remanded* used in it. They have their ordinary meaning, and the court erred in not according the plaintiff a new trial.

We find no error in admitting the evidence offered by defendant M. L. McDonald as to the intoxication of plaintiff. In the complaint it is averred that the promises of the defendant, M. L., for the breach of which this action was brought, were made in consideration, *inter alia*, of plaintiff's promise not to become intoxicated within the limits of the properties of the Santa Rosa Water Works Company and the Santa Rosa Street Railroad Company, or within the limits of the town of Santa Rosa, during his (plaintiff's) super-

intendency of the Water Works Company and of the Railroad Company above mentioned. The evidence was offered on this issue and it was properly admitted.

We pass to the consideration of the appeal from the judgment in favor of J. M. McDonald.

The plaintiff complains that the cause was continued to M. L. McDonald and the trial then proceeded against J. M. McDonald alone.

The record shows that such was the procedure. But when this course was adopted there was no objection by plaintiff. Plaintiff not only did not object to the procedure adopted, but amended his complaint in material matters as to defendant M. L. McDonald, on which the subsequent trial as to that defendant was had.

Conceding the course taken by the court below to have been irregular, it would be improper in this court to order a reversal of either judgment or order, when it appears, as in this case, that such course was had without objection by plaintiff. The plaintiff, by his conduct, waived the right to object to the course pursued herein, which was nothing more than an irregularity: Clapp v. Graves, 26 N. Y., 418.

It would be highly unjust to allow the plaintiff to object now to a procedure to which he consented by not objecting in the court below before the trial was entered on, when he should have made the objection. He should not be allowed thus to speculate on the result of the trial—taking advantage of such result if in his favor and annulling it if adverse to him.

It is said that there is no finding on the issue raised by the cross-complaint of J. M. McDonald, and the answer, on the point that no part of the principal or interest of the note upon which judgment was entered, had been paid.

The finding on this point is "that there is due from plaintiff to defendant, James M. McDonald, the whole of the principal sum of said promissory note, together with accumulated interest thereon, in accordance with the terms of said note, amounting, on the twenty-fifth of January, 1881, to eighteen thousand eight hundred and ninety-one dollars and sixteen cents, making in the aggregate the sum of twenty-six thousand eight hundred and ninety-one dollars and sixty-nine cents."

The findings further state "that the rate of two and one-half per cent on the sum twenty-six thousand eight hundred and ninety-one dollars and sixty-nine cents, *the amount found due in the case*, viz., six hundred and seventy-two dollars and twenty-five cents, is a reasonable counsel fee for counsel of defendant, James M. McDonald."

And the court finds the following conclusions of law, "that defendant, James M. McDonald, is entitled to recover of the plaintiff, J. B. Meyers, the sum of twenty-six thousand eight hundred and ninety-one dollars and sixty-nine cents, the amount of principal and interest due on said note, and the sum of six hundred and

seventy-two dollars and seventy-five cents, the amount of said counsel fees, making in the aggregate the sum of twenty-seven thousand five hundred and sixty-three dollars and ninety-four cents, besides costs of suit; and to have the said stock sold by the sheriff of the city and county of San Francisco, California, and the proceeds applied to the payment of the said amounts, and for judgment to be docketed against the said plaintiff for any deficiency which may remain after."

We think the clauses selected from the findings and the conclusions of law show that the word in the findings criticised is used in the sense of owing and unpaid, and that something more than a conclusion of law is stated by using the word "due," and that the fact is found that the sum recovered has never been paid to defendant, J. M., by plaintiff.

We think the court found on all the material issues joined by plaintiff and J. M. McDonald.

We perceive no error in denying plaintiff's motion to set aside the judgment, for the reason that the trial was had without objection by plaintiff, the judgment which was rendered and entered following logically upon the findings of fact reached on the trial so had.

For the foregoing reasons the judgment in favor of M. L. McDonald is reversed and the cause remanded for a new trial, and the judgment and order in favor of James M. McDonald is affirmed.

So ordered.

MYRICK, J., MORRISON, C. J., and ROSS, J., concurred.

No. 8,360.

GRAVES *v.* BAKER.

Department Two. Filed November 30, 1885.

HOMESTEAD—STATEMENT OF VALUE.—A statement in a declaration of homestead that the cash value thereof is "about four thousand dollars," is a sufficient statement of the value of the homestead.

APPEAL from a judgment of the superior court of San Luis Obispo county, entered in favor of the defendant, and from an order denying the plaintiff a new trial. The opinion states the facts.

W. J. & Wm. Graves, McD. R. Venable, Ernest Graves and *Craig & Meredith*, for the appellant.

Gregory & Shipsey, for the respondent.

FOOTE, C. The plaintiff sued in ejectment. The land involved in the controversy was the same as that upon which this court held a valid homestead had been declared by Miriam Graves, the wife of Crogan Graves, in case of Steiner v. Graves, No. 5,276, unreported. The plaintiff offered this declaration of homestead in evidence to support his right of possession to the land in controversy; it was excluded by the court below, and is assigned as error here.

The ground of the exclusion was that the words "the cash value of said homestead is about four thousand dollars, gold coin," in the declaration did not state clearly and explicitly the value of the homestead.

But this court, as we have seen, in the case of Steiner v. Graves, *supra*, held those words to be sufficient.

Therefore, the judgment should be reversed and the cause remanded.

BELCHER, C. C., and SEARLS, C., concurred.

BY THE COURT. For the reasons given in the foregoing opinion, the judgment is reversed and cause remanded.

No. 11,119.

MILLER v. KISTER.

In Bank. Filed November 30, 1885.

PUBLIC OFFICERS—LEGISLATURE MAY REDUCE SALARIES.—Salaried public offices, created by the legislature, are not held by contract or grant. The legislature has full control over them, unless restricted by the constitution, and may abolish them altogether, or impose upon them new duties or reduce their salaries. But, under the constitution of 1879, the legislature, in exercising its power over such officers, must control and regulate them by general laws.

COUNTY GOVERNMENT ACT OF 1883—AMENDATORY ACTS OF 1885 CONSTRUED—SPECIAL LEGISLATION.—The acts of 1885, amending the county government act of 1883, are general laws upon the subjects embraced by them, *i. e.*, the classification of counties, and the compensation of officers within the classified counties. But as general laws, the legislature restricted their operation as follows:

"Sec. 3. The salaries herein provided shall not take effect nor be in force until the expiration of the terms of the present officers, except as hereinafter provided.

"Sec. 4. The salaries herein provided for the officers of the tenth, thirty-fifth and forty-sixth classes shall take effect and be in force from and after the first day of the first month next succeeding its passage." *Held*, that such restriction prevented the uniform operation of the law, and was, in effect, special and local legislation, and, therefore, unconstitutional, under subdivision 29, article iv., of the constitution.

APPEAL from a judgment of the superior court of Mono county, entered in favor of the defendant. The opinion states the facts.

O. F. Hakes, for the appellant.

W. O. Parker, for the respondent.

MCKEE, J. Application for a writ of mandate to compel the county auditor of Mono county to draw a warrant on the county treasury, in favor of the petitioner for the sum of two hundred and fifty dollars, which he claims to be due and owing to him by the county for his salary as county clerk of the county for the month of March, 1885.

The petitioner was elected at the general election in 1884. He qualified according to law, and entered on the discharge of his official duties on the first Monday in January, 1885. From that time until the first of April, 1885, he received compensation for his services at the rate of two hundred and fifty dollars per month, under the provisions of an act entitled "an act to establish a uni-

form system of county and township governments," approved fourteenth of March, 1883: Stats. 1883, page 299.

By the provisions of that act Mono county, having a population of more than seven thousand, and less than seven thousand five hundred entered the class of counties known and designated as the thirty-fifth class; and the compensation of the county clerk of the county was fixed at three thousand dollars *per annum*, payable monthly out of the county treasury upon warrants to be drawn by the county auditor: Sections 162, 163, 169, pages 334, 354, 363, stats. 1883.

But on the first of April, 1885, when the petitioner made demand of the auditor for his usual warrant for the month of March, the auditor refused him a warrant for any greater sum than one hundred and thirty-three and one-third dollars, upon the ground that the legislature by an act passed on the eigthteenth of March, 1885, reduced salaries of county clerks of the thirty-fifth class to one thousand six hundred dollars *per annum*.

The power of the legislature to regulate the compensation of all county and township officers in proportion to duties, and, for that purpose, to classify the counties of the state by population, is unquestionable. In the exercise of that power, the legislature, by the act of 1883, carried out the commands of the constitution upon those subjects; and the act has been adjudged by this court constitutional: Longan v. Solano county, 65 Cal., 122.

But on the eighth of March, 1885, the legislature, by several enactments, revised the act of 1883, by amending the one hundred and sixty-second section "relating to the classification of counties," and "by amending and revising and subdividing into new sections" a number of the sections of the act, among which was section 163 relating to the compensation of county officers in counties of the thirty-fifth class, etc: Statutes of 1885, 166, 194, 195.

The classification of Mono county was not changed by the amendments. The county still remained in the thirty-fifth class. But it was provided that the county officers of that class shall "receive as compensation for the services required of them by law or by virtue of their office the following salaries, to wit:

"1. The county clerk one thousand, six hundred dollars *per annum*," etc.

The enactments of 1885 were made during the incumbency of the petitioner in office and the act of 1883 was passed *before* his election, and was in force as law when he qualified and entered into office.

But it is well settled that salaried public offices, created by the legislature, are not held by contract or grant. The legislature has full control over them, unless restricted by the constitution, and may abolish them altogether, or impose upon them new duties, or reduce their salaries: Attorney General Squires, 14 Cal., 12; Christy v. Board of Supervisors, 39 Id., 3.

Yet, in exercising its powers over such offices and officers, the legislature must control and regulate them by general laws free from any unconstitutional provision.

The amendatory acts passed in 1885 must be regarded as general laws upon the subjects embraced by them, *i. e.*, the classification of counties and the compensation of officers within the classified counties. But as general laws, the legislature restricted their operation as follows:

"Sec. 3. The salaries herein provided shall not take effect nor be in force until the expiration of the terms of the present officers, except as hereinafter provided.

"Sec. 4. The salaries herein provided for the officers of the tenth, thirty-fifth and forty-sixth classes shall take effect and be in force from and after the first day of the first month next succeeding its passage."

By these sections, the operation of the law upon the subject of the compensation of officers in the fifty-two counties of the state, except the counties of three classes, is suspended until the expiration of the terms of the then incumbents in office, and is put in force almost immediately upon officers of the three specified classes.

Unquestionably, the legislature has power to suspend the operation of the general laws of the state. "But when it does so," says Cooley, in his work on Constitutional Laws, page 391, "the suspension must be general, and cannot be made in individual cases or for particular localities."

A law speaks from the time of its going into effect: People v. Johnson, 6 Cal., 673. In forty-five of the forty-eight classes into which the fifty-two counties of the state have been divided, the statutes of 1885 do not speak at all. They speak only in counties of three classes. In other words, after classifying the counties of the state, and regulating the compensation of the county officers therein, the laws by which the classification and regulation are accomplished are declared inapplicable during the terms of office of officers of forty-five of the forty-eight classes, and applicable during the terms of office of three classes only; the operation of the law is, therefore, exceptional and eccentric, and is causative of discrimination between the officers upon which it is to operate. It in effect declares that the law shall not operate upon the large majority of county officers in the counties of the state, but shall operate upon the officers of three or four counties only. The very few are thereby excluded from the privileges accorded to the many. This the legislature could not do. The constitution requires that all laws of a general nature shall have a uniform operation: Sec. 11, art. i.

Where particular persons are excepted from the operation of a general law, it destroys the uniformity of its operation: Omnibus R. R. Co. v. Baldwin, 57 Cal., 165. So it is said in Teshneaher v. French, 24 Cal., 544: "The legislature cannot discriminate or grant an indulgence to one which is not accorded to another. Every general law must have a uniform operation, that is to say, it must operate equally upon all persons and upon all things upon which it acts at all." Besides, the section of the law which produces such effect is special and local legislation and objectionable to subdivi-

sion 29, article iv., of the constitution. As, therefore, section 4 of the act of 1885, page 195, stats. 1885, has the effect of destroying the uniformity of the operation of the law, and is special and local in its character, it is an unconstitutional provision: Christy v. Board of Supervisors, 39 Cal., 3. That being the case, the petitioner is entitled during his incumbency in office to the compensation awarded him under the act of 1883.

Judgment and ordered affirmed.

MORRISON, C. J., concurred.

ROSS, J., MYRICK, J., CONCURRING. We concur in the judgment on the ground that section 4 of the act of 1885, is in effect a special law as respects the counties therein referred to, which, by the twenty-ninth subdivision, section 25, of article iv., of the constitution, the legislature is prohibited from passing.

No. 8,981.

HAND *v.* HAND.

In Bank. Filed November 30, 1885.

MARRIED WOMAN—DEED—ESTOPPEL TO DENY SUFFICIENCY OF ACKNOWLEDGMENT.—The plaintiff, ever since 1855, had been a married woman, her husband being a resident of England. The plaintiff, in 1863, formed a meretricious union with the defendant, and they lived together, in California, as husband and wife, down to the year 1878. The deeds in question were executed by her, one in 1873 and the other in 1878. They were acknowledged by her as a *feme sole*, but not in the form prescribed by statute for the acknowledgment of a married woman. *Held*, that the plaintiff, by her conduct, had estopped herself from invoking such statute for the purpose of defeating her deeds.

APPEAL from a judgment of the superior court of the city and county of San Francisco, entered in favor of the defendant. The opinion states the facts.

George D. Shadburne, for the appellant.

Lloyd & Wood, for the respondent.

MORRISON, C. J. This case, which comes before us on the judgment roll, is a suit to quiet title to certain lots of land in the city of San Francisco. It is conceded that the property in question was at one time owned by the plaintiff, it having been purchased and paid for with her separate funds. But it is claimed that the defendant has succeeded to the ownership thereof by virtue of certain instruments executed by the plaintiff to the defendant. The sufficiency of those instruments to convey the title is the question before us. It was held in the superior court that the defendant had acquired the title of the plaintiff, and judgment was rendered in his favor. The appeal is from that judgment.

It appears from the findings in the case that the plaintiff was a married woman, her husband being a resident of England, but for a great many years living separate and apart from her husband. As

early as 1863 a meretricious union was formed by plaintiff and defendant, and they had lived in California as husband and wife from 1863 down to the year 1878. The first finding is "that plaintiff is, and ever since the sixth day of October, 1855, hath been the lawful wife of one William Nickels."

"2d. That during all this time the said William Nickels hath been, and still is, a resident of Colchester, England, and hath never been in the state of California or in the United States of America.

"3d. That plaintiff and said Nickels have not lived or cohabited together since 1863, but that plaintiff and defendant lived and cohabited together as husband and wife from 1863 to 1878; that plaintiff has been a resident of this state continuously since 1868."

It is conceded on both sides that the certificate of acknowledgment to the deed, attempting to convey the property in question made by plaintiff to defendant under the name of Mary Ann Hand, on the thirteenth day of August, 1873, is not in the form prescribed by the statute for the deeds of married women, but as the eleventh finding shows, is in the form prescribed by the statute for the acknowledgment of a *feme sole*, and not in the form prescribed for the acknowledgment of a married woman. Afterward, to wit, on the twenty-seventh day of July, 1878, she executed another instrument to the defendant, acknowledged in like manner, which said instrument was in the name of Mary Ann Halls.

But was the conduct of the plaintiff such as to take from her the right to invoke the statute referred to for the purpose of defeating her deed? We are of the opinion that it was. During the entire period of her residence in California she was never known as the wife of Nickels, but passed as the wife of Hand, with whom she was living as his wife, but to whom, it is not pretended, she ever was married; and a part of the time she passed by her maiden name of Mary Ann Halls. Indeed, she had done all she could do in the absence of a legal divorce to separate herself from her lawful husband, and after many years ignoring her husband she seeks to avail herself of the plea of marriage to defeat an instrument made and delivered by her as her deed. This case does not differ in principle from that of Reis v. Lawrence, decided by this court and reported in 63 Cal., 129. See also Rosenthal v. Mayhew, 33 Ohio St., 155.

There are other points made by the respondent, but it is not necessary to consider them, as we think the judgment must be affirmed on the one already stated.

Judgment affirmed.

MYRICK, J., concurred.

THORNTON, J. I concur in the judgment.

ROSS, J., CONCURRING. I agree that the plaintiff should be regarded as a single woman. The property to which she asserts title was acquired by her in this state. Her husband has never been within the United States. For twenty odd years she has re-

pudiated her marital relations, and conducted herself without regard to them. Under such circumstances, to permit her to fall back upon them and void her deed on the ground that the certificate of the notary does not recite that she was examined "separate and apart" from her husband with whom she has held no relations for more than twenty years and who has never been in this country, seems to me to be beyond all reason. I therefore concur in the conclusions reached by the chief justice.

MCKEE, J., DISSENTING. I dissent. Determination of an adverse claim made by the defendant to the parcels of land described in the complaint in this case was the object of the action.

The adverse title asserted by the defendant is one which he claims to have derived directly from the plaintiff herself.

The decision of the court below informs us, that the plaintiff is, and, since the year 1855, has been a married woman, the lawful wife of one William Nickels to whom she was married in England, and with whom she there lived and cohabited until 1863, when, it appears, she voluntarily left her husband and England and took up with the defendant, with whom she has since lived in adulterous intercourse until 1878—part of the time—*i. e.* from 1868 to 1878, in the city and county of San Francisco, he knowing all the time that the woman was the wife of Nickels.

In February, 1871, during the existence of those meretricious relations between the parties, the plaintiff purchased with separate funds of her own, the real estate in controversy, and became seized in fee of the same as her sole and separate estate; and in the year 1873, she subscribed, and delivered, to the defendant an instrument in writing reciting that, in consideration of one dollar, she granted, bargained, sold and conveyed to him the said property.

The acknowledgment of the instrument was made in the month of September, 1873, by the plaintiff as a *feme sole*; and the instrument itself was not recorded until the year 1877.

In August, 1878, the parties executed another instrument in writing as a release, in which, after a recital that they "have lived together and cohabited without any marriage between them, and that it is now the wish of each of said parties that the said relations existing between them should be dissolved and forever cease and determine," it was agreed that the plaintiff "shall have, hold and possess, free and clear of any claim or demand whatsoever," of the defendant, * * * "all the real estate wheresoever situate, now standing of record in her name," etc.; and the defendant "shall have, hold and possess, free and clear of any demand whatsoever," of the plaintiff, * * * "all the real estate wheresoever situate now standing of record in his name," etc. * * * "It being the purpose and intent of this instrument that the said parties shall go their several ways, each, in all things whatsoever, to live according to his or her tastes and desires," and that "hereafter and forever," the estates and properties of either shall be entirely free, clear and

discharged of any claims and demands of the other. The instrument was acknowledged by the plaintiff and was certified to have been acknowledged by her in the same way that the alleged deed had been acknowledged, that is to say, as *feme sole*.

On these facts the court below decided that the alleged deed of August, 1873, was translative of the title of the woman to the defendant and vested in him ownership in fee of the property.

I think the decision is against the evidence and law; because, as the conveyance of the separate estate of a married woman, the alleged deed was a nullity. A married woman, although living adulterously with another, can convey her separate real property without the consent of her husband. But the law has regulated for her, as it has done for every one capacitated to transfer property, the mode by which she may transfer her separate real property, and she cannot transfer it in any other mode than that prescribed by the law. Section 1,093 of the civil code declares: "No estate in the real property of a married woman passes by any grant purporting to be executed or acknowledged by her, unless the grant or instrument is acknowledged by her in the manner provided by sections 1,186 and 1,191."

Acknowledgment in the mode provided by law, certified to have been made according to law, is an essential element in the deed of a married woman. If it be wanting in an instrument purporting to be executed by her, the instrument is ineffectual to pass her title to her separate real property. Sections 1,093 and 1,187 declare that a conveyance by a married woman "has no validity until acknowledged" as required by law.

There was no evidence, and there is no finding in the case, that any legal acknowledgment in fact was made by the plaintiff, nor is there any such acknowledgment certified by the officer taking it to have been made. Neither the acknowledgment nor the certificate of acknowledgment is according to the law regulating the transfers of the real property of a married woman, and the instrument upon which the defendant bases his right is, as a conveyance, wholly invalid and ineffectual to pass to him the title of the plaintiff: Bank of Healdsburg v. Bailhache, 3 West Coast Rep., 140; McLeran v. Benton, 43 Cal., 467; Leonis v. Lazzarovich, 55 Cal., 507.

But it is insisted that, as the plaintiff acted and represented herself as a *feme sole*, she is estopped to deny the validity of the instrument as a conveyance.

That assumption is not founded in the facts of the case. There was no evidence given that she acted and represented herself as a *feme sole*. Certainly not to the defendant, for he all along knew her true status. It is true she concealed from the public the fact that she was the wife of Nickles; but defendant, as her paramour, was not ignorant of the fact; he knew it all along, and joined the plaintiff in promulgating the falsehood as to her marital relations with another. As *particeps criminis*, how then, was the defendant deceived by any act or representation of the plaintiff?

As I understand it, the doctrine of estoppel can only be invoked to preclude a party who has made a false representation knowingly, with intent that it should be acted upon, from denying its truth as against the party to whom it was made, provided the latter was ignorant of its falsity, and believing it to be true, acted upon it to his damage: Davis v. Davis, 26 Cal., 23. On that principle, a majority of this court decided the case of Reis v. Lawrence, 63 Cal., 129. But there is in this case no feature in common with that. In that Reis was an innocent party. In this the defendant was not. In that the woman acted fraudulently and upon a false representation to the damage of Reis. In this the woman made no false representation to the defendant. He was, therefore, neither deceived nor injured by any act or representation of hers. The court finds: "That during all of the time from 1863 to 1880 the defendant well knew and had knowledge that plaintiff was the wife of said William Nickels;" and there was no evidence, and there is no finding that the defendant ever paid a single dollar to the plaintiff, not even the nominal consideration mentioned in the alleged deed. That being the case, the title to the property in controversy "stood of record" in the name of the plaintiff, at the commencement of the action, and, according to the agreement of the defendant, it belonged to her, "free and clear of any claim or demand" by him.

I think the judgment should be reversed.

No. 9,796.

CROSS *v.* ZELLERBACH ET AL.

Department Two. Filed November 30, 1885.

STATUTE OF LIMITATIONS—WAIVER OF BY WRITING—EVIDENCE — RES GESTÆ. — Where issue is joined on the bar of the statute of limitations, in an action on certain promissory notes, and the plaintiff relies upon a writing, signed by the defendant, waiving the benefit of the statute of limitations, parol evidence is admissible of the circumstances under which such writing was executed, as part of the *res gestæ*.

THE FINDING REVIEWED AND HELD SUPPORTED by the evidence.

JUDGMENT AFFIRMED on the authority of Cross v. Zellerbach, 63 Cal., 635.

APPEAL from a judgment of the superior court of Nevada county, entered in favor of the plaintiff and the defendant company, and from an order denying the defendant, Zellerbach, a new trial. The facts are stated in the opinion, and in the report of this case on a prior appeal, in 63 Cal., 635.

R. H. Taylor and *J. M. Malling*, for the appellant.

Searls, Niles & Searls, and *H. V. Reardan*, for the respondents.

THORNTON, J. This cause has been before this court twice on appeal and the judgment on the first appeal will be found reported in 55 Cal., at page 533 *et seq.* (under the title of Sigourney v. Zellerbach), and on the second appeal in 63 Cal., at page 635. On the

appeal last referred to the case bears the same title as the one before us, Sigourney having since the commencement of the action departed this life and Cross having been afterwards appointed his administrator and been substituted in place of Sigourney.

The action was originally brought to foreclose a mortgage executed to the plaintiff Sigourney by a corporation called the Eureka Lake Company. The parties to the cause were the present plaintiff's intestate, the defendants, Eureka Lake and Yuba Canal Company, and Zellerbach. It was heard on the pleadings and findings and decree of the court below. See statement, 63 Cal., 636. The judgment in that case was reversed for reasons stated in the opinion above referred to.

On the return of the cause to the court *a qua*, the plaintiff filed in that court a supplemental complaint, which was answered by Zellerbach and the Eureka Lake and Yuba Canal Company. This company filed also a cross-complaint to which a demurrer was interposed by Zellerbach. This demurrer was sustained, and from the judgment in the case which was in favor of plaintiff and against the company, an appeal was prosecuted by the defendant company, on which appeal the main question presented was the ruling of the court *a qua* on this demurrer.

On this appeal the ruling of the court upon this demurrer was held erroneous and the judgment reversed. The facts before the court for consideration on this last appeal are also before us on the present one. We refer to the facts on which the case of the plaintiff and the defendant corporation rests.

In the opinion filed in this last appeal in 63 Cal., this court, after fully stating the facts, remarked: "If the facts be as stated we see no reason why a decree should not be entered substantially as prayed for in both the supplemental and cross-complaints, to the effect that the plaintiff retain and hold the money so paid, in full satisfaction of his demand in the action, and that he be adjudged to satisfy of record and to cancel and deliver up the note and mortgage described in the original complaint, and to cancel and deliver up to Zellerbach the forty thousand dollar and ten thousand dollar notes executed by him, and that the twelve thousand dollar note executed to Sigourney by Eureka Lake Water Company, together with the mortgage executed by that company to Sigourney and Marcellus, be decreed to be fully satisfied:" 63 Cal., 642.

It would needlessly prolong this opinion to state the facts of the case on which plaintiff and the defendant company claim the favorable judgment of this court. They are fully stated on pages 637 to 642 in 63 California Reports, and reference is made to that statement. The facts alleged in the cross-complaint, which were assumed to be true in the judgment in 63 Cal., are found now to be true in the case under consideration. We will only state here as to the one thousand two hundred and fifty shares of stock mentioned in the passage quoted above from the opinion of the court in 63 Cal., that these shares were deposited with Parrott by Zellerbach as collateral se-

curity for a note of forty thousand dollars executed by Zellerbach to Sigourney under an agreement between them executed on the twenty-third day of August, 1865, and which were sold under the judgment of the district court, which was reversed as reported in 55 California.

On the reversal of the judgment as stated above, the cause was remanded with directions to the court below to overrule the demurrer to the cross complaint and for proceedings not inconsistent with the opinion on such reversal.

The cause was sent back to the court *a qua* who heard the same and found on the testimony and the admissions in the pleadings the facts above referred to to be true, and finding them to be true entered a judgment as indicated by the opinion above referred to. The findings of the court were adverse to certain defenses set up by Zellerbach and held not to be in the way of the judgment which was rendered.

Some of the findings are attacked as not being sustained by the evidence. We have examined the testimony in the cause and find that they are as to everything material sustained.

In relation to the fourth finding, that one thousand two hundred and fifty shares of stock deposited with Parrott by Zellerbach were accepted by Sigourney as security for the payment of the notes of ten thousand dollars and forty thousand dollars, executed by Zellerback to Sigourney, we are of opinion that under the facts developed in the case the acceptance of the money for which this stock was sold by Sigourney in discharge of the notes above mentioned, was a sufficient acceptance to sustain the finding. The equity of the defendant corporation, to have such payment to Sigourney held a discharge of those notes, is perfect. This we infer to have been the opinion of the court in Cross v. Zellerbach, 63 Cal., 641. The court referring to these shares, then said: "These shares were to be held as collateral security for the payment of the forty thousand dollar note executed to Zellerbach by Sigourney. The additional amount of one sixty-fourth part of the capital stock of the same corporation which the contract required Zellerbach to deposit as collateral security for the payment of a ten thousand dollar note executed by him to Sigourney, he did not deposit; but the cross-complaint alleges that the one thousand two hundred and fifty shares so deposited, were by both Sigourney and Zellerbach, 'taken and treated as a compliance with the contract, and the stock was managed, controlled and voted by the said Sigourney, or by his authority; and remained in the hands of John Parrott as trustee under said contract,' until taken and sold by the sheriff.

"Whether, under such a state of facts, a lien attached to the one thousand two hundred and fifty shares of stock for the payment of the forty thousand dollar and ten thousand dollar notes, executed by Zellerbach, or either of them, we find it unnecessary to determine; for when the stock was sold under and by virtue of the decree of the district court, which was subsequently reversed by this court, the

cross-complainant purchased it, at the instance and at the request of Zellerbach, and under a definite and specific contract with him, for a sum largely in excess of its market value, and sufficient to discharge what Zellerbach had bound himself to discharge, to wit: the liens on the property held by Sigourney. The money thus paid and bid for the one thousand two hundred and fifty shares of the stock of the Eureka Lake and Yuba Canal Company Consolidated, less costs and the expenses of sale, was paid over to Sigourney, and, according to the averments of the supplemental and cross-complaints, was sufficient in amount to satisfy the entire demand of the plaintiff."

The court then proceeds to say, if the facts be as stated, it sees no reason why a decree should not be entered substantially as prayed for in both the supplemental and cross-complaints, etc. (See these latter remarks quoted in full above.)

It is a noticeable fact that on the former trial the judgment of the court below as regards plaintiff was substantially the same as in this case, and, as we construe the opinion, the court discovered no error in that part of the judgment appealed from. The error for which it was reversed was that in relation to the company defendant. This view sustains the decree in favor of plaintiff rendered herein.

Several errors of law are assigned as having occurred at the trial to which exceptions were reserved. We find no error in any of them. The evidence of Hupp was clearly admissible as to the intent with which Zellerbach appended his signature, and the words and figures " Nevada City, May 2, 1878," to a writing waiving the benefit of the statute of limitations as to the forty thousand dollar and ten thousand dollar notes above mentioned. Hupp, in his testimony, details the circumstances under which the signature and the words and figures were written by Zellerbach. These facts were pertinent on the issue of the bar of the statute of limitations as to the aforesaid notes, and were parts of the transaction or *res gestæ*. The court committed no error in allowing this testimony.

We find no error in the record, and the judgment and order must be affirmed.

Ordered accordingly.

MORRISON, C. J., and MYRICK, J., concurred.

No. 9,984.

SHARON v. SHARON.

In Bank. Filed November 30, 1885.

APPEAL FROM ORDER AWARDING ALIMONY—AMOUNT OF UNDERTAKING.—On an appeal from an order awarding a designated sum as counsel fees, and alimony, at a specified rate to be paid monthly, an undertaking to stay execution is sufficient, under section 942 of the code of civil procedure, if it be in double the amount of the lump sums and double the amount of the monthly payments for the period of three years.

APPEAL from an order of the superior court of the city and county of San Francisco, entered in favor of the plaintiff. The opinion

states the facts. The opinion on a former hearing is reported in 7 West Coast Rep., 178.

W. H. L. Barnes, O. P. Evans, Stewart & Herrin and *F. G. Newlands*, for the appellant.

Tyler & Tyler, D. S. Terry, Flournoy, Mhoon & Flournoy and *Walter H. Levy*, for the respondent.

THORNTON, J. In this case, on a rehearing granted on the twenty-ninth of July last, a question as to the character of the undertaking required to stay proceedings in the court below, on the appeal from the order in relation to alimony and counsel fees, was left open to be argued. That question has been submitted for decision.

We are of opinion that the undertaking filed in this case is sufficient. It is in form proper, and in amount appears to be ample in point of security to the respondent in case of affirmance of the order. It does not appear that any exception was taken to the undertaking in the court below for insufficiency in form, or in any other respect.

The order herein, as said in the former opinion, is in the nature of a final judgment, and under such circumstances the statute as to the undertaking to stay proceedings on a final judgment applies. The statute, code of civil proceedure, section 942, requires that the undertaking for a stay of proceedings in such case should be in double the amount named in the judgment or order. In this case in the order in relation to alimony and counsel fees, two lump sums are mentioned, and also a sum which is required to be paid monthly. The amount in the undertaking is double the amount of the lump sums, and double the amount of the monthly payments for the period of three years, assumed to be the period during which the appeal will probably be pending. The whole amount covered by the undertaking is three hundred and five thousand dollars. We think that the undertaking for such amounts is in accordance with correct construction of the statute when applied to such an order.

We find nothing in *Ex parte* Perkins, 18 Cal., 60, or *Ex parte* Cottrell, 59 Id., 417, or Macnevin v. Macnevin, 63 Id., 186, in conflict with our former decision in this case. In Church v. Church, No. 9,405, heard before department one, there was no opinion delivered, and on what grounds the motion in that case was denied, does not appear on the records of this court. Conceding that some inconsistency appears to exist from the fact that the motion in that case was denied, we think the ruling in this case is the better one, and we adhere to it: See the statement as to Church v. Church, in the opinion of this court filed on the twenty-ninth of July, 1885, 7 West Coast Rep., 178.

The order originally made in this case will stand as made.

MORRISON, C. J., ROSS, J., SHARPSTEIN, J., and MYRICK, J., concurred.

MCKEE, J., dissented.

Mr. Justice MCKINSTRY, being ill, takes no part in the decision of this case.

No. 9,199.

STRATTON v. GRAHAM.

Department Two. Filed December 8, 1885.

APPEAL—DEPOSIT IN LIEU OF UNDERTAKING—TIME FOR MAKING.—Depositing a sum of money with the clerk of the trial court, more than five days after the notice of appeal was filed and served, is insufficient to perfect the appeal under section 940 of the code of civil procedure.

Motion to dismiss an appeal from the superior court of Napa county. The opinion states the facts.

Henry H. Davis, for the appellant.

Joy & Ham, for the respondent.

FOOTE, C. The record before us discloses this state of facts: That a notice of appeal from the judgment, and an order denying plaintiff a new trial was filed and served on the twenty-fifth day of July, 1883. That no undertaking on appeal was filed, nor was the same ever waived by the adverse party in writing, but that, according to the certificate of the clerk of the trial court, a sum of money in lieu thereof was deposited with him for the appellant, on the thirty-first day of August, 1883—more than five days after the notice of appeal was served and filed. Therefore, on the authority of Biagi v. Howes, 63 Cal., 384, Francis E. Stratton, claiming to appeal under section 940, code of civil procedure, without having in effect done so, should be refused a hearing by this court.

BELCHER, C. C., and SEARLS, C., concurred.

BY THE COURT. For the reasons given in the foregoing opinion the appeal is dismissed.

No. 9,107.

CLAFFEY v. HARTFORD FIRE INSURANCE COMPANY.

Department Two. Filed December 4, 1885.

BILL OF SALE—IDENTIFICATION OF PROPERTY SOLD A QUESTION OF FACT.—Whether a barn was intended to be included within a bill of sale, in which the property sold was described as "the Wolfe houses," is a question of fact for the jury, and it is error for the court to instruct the jury that the bill of sale could not include the barn.

APPEAL from a judgment of the superior court of San Mateo county, entered in favor of the defendant, and from an order denying the plaintiff a new trial. The opinion states the facts.

E. A. & G. E. Lawrence, for the appellant.

Gray & Haven, for the respondent.

FOOTE, C. Plaintiff, Claffey, instituted this action, against the defendant, on a fire insurance policy, alleging that it covered a loss he had sustained by the burning of a certain barn. The defendant's main objection to payment of the demand was a breach of warranty on the part of plaintiff, in representing that the barn was his prop-

erty, when he had no title thereto. The plaintiff, as tending to show ownership of the building in dispute, introduced in evidence the following copy of a bill of sale:

"For a valuable consideration, the Spring Valley Water Works grants and conveys unto John Claffey the Wolfe houses, but reserves the right to use the same until the first day of November, A. D. 1877.

"Witness the corporate name and seal of said corporation hereunto subscribed and affixed by Chas. Webb Howard, its president, in pursuance of a resolution heretofore passed by its board of directors, this ninth day of July, A. D. 1877.

"THE SPRING VALLEY WATER WORKS.

"By Chas. Webb Howard, President."

There was evidence introduced on the trial, which tended to prove that a house, barn and two sheds had been built by a Mr. Wolfe, and they were generally designated "the Wolfe houses;" that they had become the property of the Spring Valley Water Works, and, under the bill of sale from that corporation, the plaintiff had become the owner thereof.

The word *houses* being used in the bill of sale, it is plain that more than one house was by it conveyed to the plaintiff, and such an ambiguity existed in that instrument as warranted an explanation by parol testimony to determine whether or not the term "the Wolfe houses" included the barn in question.

The court below informed the plaintiff, after all the testimony in the cause had been allowed to go to the jury, that a nonsuit ought to have been granted, because the bill of sale put in evidence did not include the barn, and that plaintiff had not shown any title in himself to it, and that the jury should be so instructed, which was done, and a verdict returned for the defendant.

The issues of fact as made should have been submitted to the jury for decision, upon the evidence introduced, and as such course was not taken, the judgment and order denying a new trial should be reversed, and the cause remanded.

BELCHER, C. C., and SEARLS, C., concurred.

BY THE COURT. For the reasons given in the foregoing opinion, the judgment and order are reversed and the cause remanded for a new trial.

WEST COAST REPORTER.

WHOLE No. 103. DECEMBER 17, 1885. VOL. VIII. No. 7.

SUPREME COURT OF COLORADO.

BRANAGAN ET AL. *v.* DULANEY.

Filed November 13, 1885.

MINING LOCATION—RIGHTS OF PRIORITY—CROSS VEINS.—Under sections 2,322 and 2,336 of the United States revised statutes, when a junior mining location crosses a senior location, and the veins thereof are "cross veins," the junior locator is entitled to all the ore found on his vein, within the side lines of the senior location, except at the space of intersection of the two veins. In such case the junior locator has a right of way for the purpose of excavating and taking away the mineral contained in the cross vein.

ERROR to the district court of Clear Creek county. The opinion states the facts.

Post & Smith and *Thos. Mitchell*, for the plaintiff in error.

R. S. Morrison, for the defendants in error.

BECK, C. J. This action involves the construction of two sections of the mining laws of the United States, to wit, sections 3 and 14 of the act of May 10, 1872, otherwise known as sections 2,322 and 2,336, revised statutes of the United States.

These sections are as follows: Section 2,322. "The locators of all mining claims heretofore made, or which shall hereafter be made on any mineral vein, lode or ledge, situated on the public domain, their heirs and assigns, where no adverse claim exists on the tenth day of May, 1872, so long as they comply with the laws of the United States and with state, territorial and local regulations not in conflict with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations; but their right of possession of such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as above described, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges;

and nothing in this section shall authorize the locator or possessor of a vein or lode, which extends in its downward course beyond the vertical lines of his claim, to enter upon the surface of a claim owned or possessed by another:" Section 3, A. C., May 10, 1872.

Section 2,336. "When two or more veins intersect or cross each other, priority of title shall govern, and such prior location shall be entitled to all ore or mineral contained within the space of intersection; but the subsequent location shall have the right of way through the space of intersection for the purposes of the convenient working of the mine. And when two or more veins unite, the oldest or prior location shall take the vein below the point of union, including all the space of intersection:" Section 14, A. C., May 10, 1872.

The only question presented by the record before us, is, what are the respective rights of the parties under the above sections, in respect to ownership of minerals and right of way, when a junior location crosses a senior location, and the veins thereof are "cross veins"?

This question arises upon the pleadings, which are to the effect that the plaintiff below, Sophia B. Dulaney, was owner of the east six hundred and seventy-five feet of the Hidden Treasure lode mining claim, for which lode a patent had been duly issued, and which is situate in Griffith mining district, Clear Creek county, this state.

The defendants, Branagan, Williams and McCoy, were the owners of the Patrick Branagan lode, an unpatented mining claim situated in the same mining district, and which crossed the Hidden Treasure location diagonally.

The plaintiff, Dulaney, alleges in her complaint, which was filed in the district court of Clear Creek county, May 26, 1879, that the defendants on the thirtieth day of April, 1878, wrongfully ousted her from her said property and ever since have kept her out of the possession thereof.

The defendants answered, denying the alleged ouster, alleging their possession and lawful right of possession of the Patrick Branagan lode mining claim, on and before the date of the alleged ouster; that said mining claim was situate in said Griffith mining district, and was fifteen hundred feet in length by one hundred and fifty feet in width. They admitted that in working their said vein they had drifted through the plaintiff's location, and had sunk a shaft from the floor of said drift upon their said vein, the top of which shaft was within the surface lines of the Hidden Treasure claim. They averred the fact to be, that the Patrick Branagan lode crossed the Hidden Treasure location, and was a cross lode, and that the defendants had a legal right to drift through the plaintiff's location, and to take out all ore found therein upon their said vein, except at the space of intersection, of their said vein with the veins of the Hidden Treasure mine. The plaintiff demurred to this answer, alleging as ground of demurrer, that it showed on its face an illegal

possession and trespass. The demurrer was sustained, and judgment rendered for the plaintiff.

It is this ruling and judgment that we are called upon to review.

Strange as it may seem, the question here presented has never, to our knowledge at least, been passed upon either by the supreme court of the United States or by the supreme court of any state. We are not, however, without valuable aid to the proper interpretation of the mining sections herein above set forth.

Upon one side of the question we have the views of the author of the valuable treatise entitled: "Morrison's Mining Rights," and upon the other side, a decision of the district court of the United States for the district of Colorado, in the case of Hall v. The Equator Mining and Smelting Company to be found in the above mentioned treatise, 3 ed., page 282.

The two sections quoted appear to have been carelessly drafted, for they are certainly, to some extent, in conflict with each other. If the latter section contained the only provisions bearing on the subject, we would have no hesitation in saying that, where two veins cross each other, as alleged to be the fact in the present case, the senior location (Hidden Treasure) would only be entitled to the ore at the space of intersection of the veins; and that the owners of the cross lode (Patrick Branagan) would be entitled to all ore found in their vein within the side lines of the senior location, save at the actual space of vein intersection. If this is not the rule intended to be laid down in section 2,336, then it would seem that the framers of that section are liable to the charge of using words to *disguise*, instead of *express*, their meaning. This construction, however, seems to be in conflict with a literal interpretation of section 2,322, which gives to the owners of the senior location all veins, lodes and ledges, throughout their entire depth, the tops or apexes of which lie inside the surface lines of the senior location. It is possible that it was not intended by the framers of this section to include *cross lodes* in the grant of the prior location. But if such was the intention, we see no way out of the dilemma, except by the application of the arbitrary rule of construction suggested by the court in the case of Hall v. Equator, etc., *supra*, that, as between conflicting statutes, the latest in date will prevail; and, as between conflicting sections of the same statute, the last in the order of arrangement will control, to which rule of construction the court cites: Bacon's Abr. Stat. D.; Dwarris on Stat., 156 N.; Brown v. Connors, 29 Pa., 37; Smith v. Moore, 26 Ill., 392.

This rule is not nullified, or rendered inapplicable to the sections under consideration, by section 5,600, R. S. U. S., which prohibits an inference or presumption of a legislative construction to be drawn from the classification or arrangement of the sections of the revision. Both of these sections are found in the act of congress of May 10, 1872, where they appear in the same order as in the revision; section 2,322 of the latter being section 3, and section 2,336 of the revision being section 14, of the act of congress. The rule

is applicable, therefore, since section 5,600, R. S. U. S., does not apply.

Mr. Morrison's view of the subject appears to be, that the owners of the prior location are entitled, under the law, to all veins of mineral within the lines of their location, whether they be side veins, cross veins, or spurs; or whether they lie transversely to the main vein, or are collateral to the same, *provided* only, that the tops or apexes thereof are found to be within the side lines of the senior location. He is further of opinion that the words in section 2,336, "*space of intersection*," were intended to mean the space of intersection of the surface locations, and not the space of intersection of the veins. In support of this view, he argues that if the space of vein intersection only be intended, this same *space* must limit the *right of way* of the junior locator, who would then have a lode crossing the entire location of another party, from side line to side line, but no right of way except at the actual crossing of the veins.

With counsel for appellant, we think that, in such event, the junior locator would have a way of necessity through the older location: Yunker v. Nichols, 1 Col., 551; Washburn on Easements, 163. These authorities, and those cited therein, support the proposition that in the above case not only the cross vein would be reserved from the prior grant, but likewise a right of way for the purpose of excavating and taking away the mineral contained in the cross vein. Also that, upon a grant of the cross vein itself, such right of way would pass as incident to the grant.

We are of opinion that the demurrer to the answer should have been overruled.

TUCKER ET AL. *v.* MCCOY.

Filed November 13, 1885.

PRE-EMPTION—PUBLIC LANDS—TOWN LOTS.—The statutes of the United States, providing for the pre-emption of public lands, were not intended to apply to town lots.

THE SAME—LAND IN OCCUPANCY OF ANOTHER.—The right of pre-emption cannot be exercised as to lands which are at the time in the occupancy of another.

THE SAME—EVIDENCE—FINDINGS.—In a suit to determine which of the parties was entitled to a deed for certain town lots, the evidence held to support the findings and decree.

APPEAL from the district court of Clear Creek county. The opinion states the facts.

L. H. Shepard, for the appellants.

L. C. Rockwell, for the appellee.

STONE, J. This case was brought here once before, 3 Col., 284, and the decree was reversed on the ground of defective pleadings, and the cause remanded with leave to file amended pleadings, without prejudice to the testimony already taken. The record now brought up shows that such amended pleadings were filed, additional testimony taken in accordance with the issues thus made, a hearing

had thereon and decree rendered in favor of McCoy, the defendant below.

The error assigned is that the finding and decree are erroneous in that, upon the evidence in the case, they should have been in favor of the complainants below.

The suit was brought to determine which of the parties litigant was entitled to a deed from the proper authorities of the town of Georgetown for certain lots included in the town site entry under the act providing therefor. Appellee claims under title derived from one Koser, the alleged original occupant. Appellants claim under various titles sought to be derived from one Thomas, an alleged partner of Koser in the original occupancy of the premises, and also attempt to show an abandonment on the part of Koser. Appellants, in argument, also lay stress upon the fact that one of their grantors "pre-empted" the lots by filing a declaration of pre-emption under an early territorial statute relating to occupants of and claimants to lands of the public domain. It is unnecessary to present or review the evidence in the case for the purposes of the decision here. Section 6, article 12, of the statute of 1868, entitled "towns and cities," and providing for the manner of obtaining and settling titles to lots therein by occupants and claimants thereto, declares who shall be deemed to have the better right to lands in such cases. "The person or persons who shall have first acquired the right to the possession or occupancy of such lands, either in person or by agent, attorney, servant or tenant, or those claiming under him, her or them, shall in every such action be deemed to have the prior and paramount right to such land; and any rule of law or equity which would prevent a determination in accordance with such prior right, shall be disregarded in such action."

Guided by the standard of evidence thus presented by the statute, the court below evidently found upon the testimony that Koser, the immediate grantor of appellee, was the prior occupant of the premises in controversy; that he built two log cabins thereon in 1867, lived in them, cleared off the ground, carried on brick making thereon and that when he went away a year or two afterwards he did so with no intention of abandoning the premises, for that he left the witness Dosch as his agent and tenant in charge who had worked for Koser in building the cabins and who occupied the premises and lived in the house until 1872, when Koser sold the premises to appellee McCoy. On the other hand it is evident that the court found that the alleged title of one of the grantors of appellants derived through a sheriff's sale of the premises upon a judgment of a justice of the peace against Thomas the alleged partner of Koser, was fatally defective and unavailing as against the rights of Koser and that the subsequent conveyances set up in evidence rest upon no better foundation. As regards the pre-emption declaration of Case, one of the grantors of appellants, it is evident that the statute providing for such declaration of right was not intended to apply to town lots, or to any other description of property than

agricultural lands or portions of the public domain which should be occupied by settlers before the public surveys had been extended over such lands, and hence before such occupants could avail themselves of the pre-emption laws of the United States in securing title thereto: R. S., chapter 72, *vide* sections 9 to 12. A very different mode was prescribed by law for securing title to town lots by the occupants thereof. Even if our statutory so-called "pre-emption" act were applicable in the case before us, Case was in no position to exercise such right, since the premises were already occupied by the tenant of Koser when Case went on the ground, put up his fence and filed this statutory declaration.

Upon the facts in the case as established by the evidence, two different judges of the court below have upon both hearings found in favor of appellee, who derived immediate title from the original occupant, who had the prior and better right to the premises, and that his grantee, the appellee, was entitled to a deed therefor from the town authorities, and we can find nothing in the evidence brought up by the record before us, or in the arguments of counsel seeking a reversal, to warrant us in disturbing the findings of fact or the decree of the court rendered thereon.

The decree entered below is accordingly affirmed.

SUPREME COURT OF NEVADA.

SWEENEY *v.* SCHULTES ET AL.

Filed December 8, 1885.

REHEARING DENIED.

APPEAL from a judgment of the sixth judicial district court, Eureka county, entered in favor of the plaintiff. The prior opinion is reported in 5 West Coast Rep., 662.

H. K. Mitchell, for the appellants.

Wren & Cheney, for the respondent.

HAWLEY, J. A re-argument of this case, upon rehearing, has not changed our views in any respect. The questions involved were sufficiently discussed in our former opinion: 5 West Coast Rep., 662.

The judgment of the district court is affirmed.

SUPREME COURT OF OREGON.

WATSON *v.* DUNDEE MORTGAGE AND TRUST COMPANY ET AL.

Filed November 16, 1885.

ASSIGNMENT OF MORTGAGE NEED NOT BE RECORDED—NOTICE.—An assignment of a mortgage, whether the same be in the form of a conveyance, a simple writing, or a transfer of the debt secured, is not required, by the registry act, to be recorded, in order to impart notice to or to protect the assignee against subsequent incumbrances and purchasers.

FORECLOSURE OF MORTGAGE—RIGHTS OF PURCHASER—LIEN OF PRIOR MORTGAGE WHEN SURVIVES—MERGER.—A purchaser at a foreclosure sale, under a prior mortgage, acquires the right of the mortgagee, so far as he has any claim or interest in the mortgaged premises for the security of his debt, and also so much of the equity of redemption as is not bound by the lien of a junior mortgage. And a conveyance by such purchaser will not merge the lien of the prior mortgage in the fee so as to give a junior mortgagee, who was not a party to the foreclosure suit, priority over the rights of the grantee, and those claiming under him, whether as purchasers or incumbrancers.

MERGER—EQUITABLE PRINCIPLES GOVERNING. — When a greater and less estate unite in the same person, equity will not consider them as merged, unless it is perfectly indifferent to the party in whom they are united, whether the charge or term should or should not subsist. If the owner has an interest in keeping them distinct, or there is an intervening right, there will be no merger.

MORTGAGE TO MANAGER OF CORPORATION—ASSIGNMENT—NOTICE.—Where a subsequent mortgage is taken in the name of the manager of a corporation, for and on behalf of the latter, and afterwards assigned to it, and a suit to foreclose a prior mortgage is brought, in which such manager is made a party defendant, and served, the notice to him of such suit is notice to the corporation.

APPEAL from the circuit court. The opinion states the facts.

Ellis G. Hughes for the appellant.

Wm. M. Ramsey, for himself and for the respondents, B. F. Bonham, W. G. Piper, and S. F. Chadwick.

W. H. Holmes, for the respondent F. Levy.

LORD, J. This is a suit in equity to foreclose a mortgage executed by Eugene McCallister to the plaintiff upon a certain tract of two hundred and twenty acres of land in Marion county. The question to be decided involves the priority of liens, first, as between the appellant and the plaintiff; and second, as between the appellant and his co-defendants.

A summary of the facts out of which the controversy arises are: That the two first mortgages on this land were given by H. H. McCallister and wife to Eliza Dickson, one in October, 1874, and the other in November, 1878, to secure two certain promissory notes, and that subsequently the same were assigned to James Dickson. After this, and in September, 1879, the next mortgage was given by the said H. McCallister and wife to "Wm. Reid, manager," upon the same land, and *other lands* of the mortgagors, to secure notes of that date; and this is the mortgage through which the appellant, The Dundee Mortgage and Trust Investment Company, make their claim in this suit. At the time this mortgage was executed, and until September, in 1882, Wm. Reid was the general agent of the Dundee Company, and manager of its affairs in this state. In January, 1880, William Reid, manager, assigned the said mortgage by an instrument in writing, duly acknowledged but not recorded, to the Dundee Co.

In December, 1880, James Dickson brought a suit to foreclose the two mortgages assigned to him by Eliza Dickson, in the circuit court for Marion county, against H. McCallister and wife, and made Wm. Reid a party, as the holder of a subsequent lien. Service of the summons was duly made on Reid personally. In February, 1881, a decree was rendered in favor of Dickson for six thousand two hundred and eighty-two dollars and twenty-eight cents; and three hundred and thirty-eight dollars costs and disbursements, as the first lien. Execution was issued and the premises were sold in April, 1881, to John Hughes, for six thousand seven hundred and ninety-four dollars and nineteen cents, being but one dollar in excess of such decree, interest, costs and disbursements, and accruing expenses. This sale was confirmed and a sheriff's deed executed to Hughes.

On September 21, 1881, Wm. Reid, manager, filed his petition to foreclose the mortgage so given to him, in the United States circuit court, and in that petition Reid, as plaintiff, alleges that the two mortgages given to Eliza Dickson on the two hundred and twenty acre tract were prior liens, and had been foreclosed in a suit to which he was made a party in the circuit court for Marion county, and the said tract was duly sold under the decree therein, and the lien of his mortgage thereby cut off and extinguished as to such tract; and that he then had no lien thereon and was not entitled to any decree for the sale of the same. John Hughes, who then held the legal title to said tract of land, under the sheriff's deed, was made a party defendant to such suit. A decree of foreclosure was rendered in May, 1882, for the amount due on the mortgage, and for the sale of all the land included therein, except this two hundred and twenty acres, and the same was duly sold under such decree in October, 1884. On the third day of October, 1881, Hughes and wife conveyed the two hundred and twenty acre tract to Geo. W. Swegal for the stated consideration of seven thousand five hundred dollars, and on July 20, 1882, Swegal and wife conveyed the same property to Eugene McCallister for the stated consideration of five thousand dollars. On that day the plaintiff loaned Eugene McCallister five thousand dollars, and took the note and mortgage which forms the basis of this suit. In July, 1883, Eugene McCallister brought an action in ejectment against H. McCallister and wife to obtain possession of the mortgaged land. The defendants filed a cross bill in equity that the plaintiff Eugene McCallister hold in trust for them; and in January, 1884, a decree was made to that effect. On the twenty-ninth day of January, 1884, but after the decree in the supreme court, H. McCallister and wife executed a note and mortgage upon this tract of land to the defendants Bonham, Ramsey, Piper and Chadwick. The defendant Levy is a judgment creditor. The decree for the balance in favor of the appellant in the United States court was not docketed until subsequently to all these liens. The court below rendered a decree declaring that the lien of the defendant and the lien of the co-defendants of the appellant were prior to its lien.

Upon the facts, as stated, the appellant admits that the plaintiff made her loan and took the security in good faith and without any notice of the trust as between Eugene McCallister and H. McCallister and wife, and upon the representations of the latter to the plaintiff at the time, that their son Eugene was about to make the purchase on his own account and needed the money to pay the purchase price, and that the amount claimed by the plaintiff is due; admits that the plaintiff had no notice of the assignment by Reid to the appellant, nor had Dickson any actual notice of the same, and that Reid was manager for the defendant, and had notice of the facts as to Dickson's foreclosure, and that the two hundred and twenty acre tract is not of sufficient value to pay the plaintiff anything, if appellant has no first lien; admits that the two hundred and twenty acre tract was excepted out of the foreclosure proceedings in the United States court, but the plaintiff was no party to that suit.

The first question presented for our consideration upon this record is, whether the assignment of a mortgage is such a conveyance as is manifestly within the intent of our registry act. If it is such a conveyance, the counsel for the appellant admits that the failure to record the assignment of the mortgage in this suit is fatal to this case. Upon this point, the contention of the plaintiff is, that a mortgage is a conveyance of an "estate or interest" in lands; otherwise there is no provision under the registry act for recording it, as it is not specially named in the statute: Mis. Laws, chap. 6, page 514 *et seq.*; and his conclusion is, that if a mortgage is such a conveyance, an assignment of a mortgage must be also, for it passes the estate or interest of the mortgagee to the assignee. And this conclusion, the counsel for the plaintiff insists is further strengthened by a fair construction of all the provisions of our registry law taken in connection with the provisions of section 411 of the civil code, for the foreclosure of liens.

In this state, a mortgage is literally a security for a debt, or the performance of the acts therein mentioned: Sellwood v. Gray, 11 Or., 535; but in form, it is a conveyance, and as such within the intent of the registry act, which requires it to be recorded to affect with notice subsequent incumbrances and purchasers. And the assignment of a mortgage may be in the form of a conveyance, and when thus executed and acknowledged it may be admitted to record. But we all know that the assignment of a mortgage may be effected without any such formal conveyance. It may be assigned by a mere writing of the assignor declaring that he hereby assigns the mortgage to the person named in such writing, or it may be assigned by a simple indorsement or delivery of the note for which the mortgage is a security. It is a familiar principle that in the case of a debt, secured by mortgage, the debt is the principal and the mortgage an incident, and that an assignment of the debt is an assignment of the mortgage. This principle is too well understood, and the authorities in support of it, are too numerous to require citation.

And in cases of this character which are not in the form of a conveyance, there is no assignment to record or which would be entitled to record. Nor do we understand when the assignment of the mortgage is made in the form of a conveyance, there is any obligation imposed by the statute which requires the assignee to have it recorded to protect himself against subsequent incumbrances and purchasers; only when executed in such form, it may beadmitted to record, and when recorded a certified copy of it may, perhaps, be used as evidence. Such would seem to be the effect and extent of the implication arising out of sections 22 and 34 of the chapter of miscellaneous laws referred to *supra*.

But, however this may be, there in nothing in these sections, or the statute, expressly, or otherwise, requiring such an assignment to be recorded by the assignee to protect himself against subsequent purchasers and mortgagees. The most that can be said is, that when the instrument of assignment is in the form of a conveyance it may be admitted to record, but the statute imposes no obligation upon the assignee to record it. Whether he shall record it or not, when in such form, would seem to be wholly discretionary. The fact that the mortgage may be assigned by other modes not in the form of a conveyance, effectual to transfer the lien which would not be entitled to record, without prejudice to the rights of the assignee as against subsequent purchasers or incumbrancers, would seem to make this all the more apparent, The reason which brings the mortgage within the intent of the recording act, without specially naming it, and requires it to be recorded to give constructive notice, is that it must necessarily be in the form of a conveyance. There is no other mode of executing it, the necessity of the case brings it within the meaning of the registry act for the recording of conveyances.

It is needless to say that an assignment of a mortgage does not come within this principle. The general rule is that unless the recording of the assignment is required by law the recording of it is of no effect: Pomeroy's Eq., section 651, and note. The truth is, the construction of our recording act in respect to the particular matter under consideration has received a very careful consideration by Mr. Justice Deady in O. and Wash. Trust Co. v. Shaw, 5 Sawyer, 342,3; and the result he reached was in conformity with the view here approved. While it is true, his construction of our statute is not absolutely binding upon us, yet his acknowledged familiarity with our statutes, rendered perhaps more specially so by his repeated and eminent services in their codification, and his deservedly high reputation as a jurist and thinker, entitles his judicial opinions at all times to high consideration, and in the particular case to more than ordinary weight. He said: "In the absence then, of any legislative direction to their effect, there does not seem to be any obligation resting upon an assignee to record his assignment to protect himself against any subsequent purchaser or mortgagee." And in this view we record our concurrence as the result of our investigation.

It is not claimed by the appellant that when Hughes purchased at the foreclosure sale of the Dickson mortgages, by such sale he acquired the legal title formerly owned by H. McCallister and wife, subject to the lien of the mortgage to the appellant, and a claim on the property prior to the lien of the appellants as for the amount due on the Dickson mortgages. In Sellwood v. Gray, 11 Or., 535, it was held that the effect of a foreclosure is to transfer to the purchaser the rights of the mortgagee, so far as he has any claim or interest in the mortgaged premises, for the security of his debt, and, also, to transfer to him so much of the equity of redemption as was not bound by the lien of a junior mortgage.

The title, then, which Hughes acquired under the sale to him was precisely the same as if he had taken an assignment of the Dickson mortgages, and the deed of Hardin McCallister and wife of all their interests in the premises, subject to the right of the appellant to redeem the premises by the payment of the amount due on the Dickson mortgages. He had all the estate of the mortgagors and mortgagee, subject only to the lien of the appellant's mortgage. And as to the Dickson mortgages, with which we are more particularly concerned, he acquired the right to them in the same manner and to the same extent as though the mortgages had been assigned to him without foreclosure: Vanderkamp v. Shelton, 11 Paige, 33; Vroom v. Delinas, 4 Paige, 531. Of course, we are proceeding upon the hypothesis, as contended for by counsel for appellant, that the appellant, the Dundee Co., was not made a party to the foreclosure under the Dickson mortgages, and as to it, the proceedings were a nullity.

But to return. As a result of this, it is admitted that when Hughes bought at the foreclosure sale, he acquired, as separate and distinct interest in him, the prior lien of the Dickson mortgages, and the legal title, subject to the lien of the appellant's mortgage. Now the counsel for the appellant contends that if these interests were in fact existing in him as separate and distinct interests, then, under the rule of merger, he had the power to merge one in the other, and once merged, they never could be separated; or that he had the power to keep them separate, and convey one as separate from the other, but that when he conveyed by deed to Swegal, and Swegal to Eugene McCallister, the effect was to work a merger of the lien and fee; and, as a consequence, when the plaintiff loaned the money to Eugene McCallister, for the purchase of the property, the Dickson mortgages and the fee being merged, she did not succeed to the equitable interest of the Dickson mortgages as a purchaser under the decree of foreclosure.

It is difficult to understand, upon the facts disclosed by this record, how the foundation for a merger could exist while the outstanding incumbrance of the appellant was a subsisting lien upon the land. Some brief notice of what constitutes merger, and how it is regarded in equity, will assist in the disposal of the question under consideration. A merger is defined to be "where a greater

and lesser estate coincide and meet in one and the same person, in one and the same right, without any intermediate estate," that at once the lesser estate is absorbed by the greater, or, in legal parlance, merged. In equity, mergers are considered odious, and are much less favored than at law, and are made to depend upon the intention and interest of the party. It is only in those cases where it is perfectly indifferent to the party in whom the interests had united whether the charge or term should or should not subsist, that in equity the term is merged: Forbes v. Moffit, 18 Ves., 394. But if the owner has an interest in keeping them distinct, or there is an intervening right, there will be no merger. "The doctrine of merger," said Bellows, C. J., "springs from the fact that when the entire equitable and legal estates are united in the same person, there can be no occasion to keep them distinct, for ordinarily it could be of no use to the owner to keep up a charge upon an estate of which he was seized in the fee simple; but if there is any outstanding, intervening title, the foundation of the merger does not exist, and, as a matter of law, it is so declared:" Stanton v. Thompson, 49 N. H., 272. "But if the owner of the legal and equitable title has an interest in keeping these titles distinct, he has a right so to keep them, and the mortgage will not be extinguished:" Wilde, J., in Lord v. Lane, 8 Met., 518.

The intent to preserve the interests or rights distinct may be express or implied. And Lord Thurlow said: "Whenever it is more beneficial for the person entitled to the charge, to let the estate stand with the incumbrance upon it than to take it discharged of the incumbrance, that circumstance will have a controlling influence in deciding upon the implied intent:" Compton v. Oxeden, 2 Ves. Jr., 264. In the absence then, of an express intention to the contrary, the intention to keep the two estates separate will be implied or presumed, when it is for the interest of the party that they should be kept separate. It will not do, then, as was said by Elliot, J., to assume, as a matter of course, that there was a merger, for there are many cases in which, in order to prevent injustice, courts will not allow merger to take place, although all the essential elements of a technical merger combine in the particular case: Evansville Gas Light Co. v. State, 73 Ind., 222.

Now, the Dickson mortgages being prior liens to that of the appellant's, who was not made a party to the foreclosure proceedings under them, Hughes, by his purchase at such foreclosure sale, acquired, not only the equity of redemption, subject to the mortgage of the appellant, but the right to the Dickson mortgages in the same manner and to the same extent as though they had been assigned to him without foreclosure. And it was manifestly for the interest of Hughes that those mortgages should not be extinguished or merged in the legal title, as the mortgage of the appellant was a subsisting lien upon the property, and he would have been obliged to satisfy it before the property would be free from incumbrance; or in other words, he would lose the benefit of the Dickson mortgages

to which he had been subrogated by said foreclosure sale. To place Hughes, or those who succeeded to his place, or rights, in this position, upon the ground of a technical merger, would work a flagrant injustice, while by keeping these interests separate and distinct, the rights of priority are preserved and maintained in the order in which the several transactions occurred and were recorded, and injustice prevented. Surely, if it be true, as counsel contended, that these mortgages have not been foreclosed as to the appellant, because it was not made a party to the foreclosure proceedings under them, then, they are still in existence, not merged, but subsisting liens, and being prior liens to that of the appellant, the only way for the appellant to get rid of them, is to redeem.

Nor is it perceived why the same equitable principle is not alike applicable to the other purchasers, Swegal and Eugene McCallister. If Hughes, as purchaser at the sheriff's sale, under the decree of foreclosure succeeded to all Dickson's rights and priorities under these mortgages, so did Swegel, as purchaser from Hughes, and Eugene McCallister, as purchaser from Swegel, become invested with the same rights and priorities. It would be as manifestly unjust to allow a technical merger against them as Hughes, and the interest of each successive party to the transaction is such in keeping the estates or interests separate that equity will presume such was the intention.

The facts show a case where it is not perfectly indifferent to parties in whom the interests had united that they should or should not be merged, but their interests require that they should be kept separate to protect from injustice and to conserve equity and good conscience. And in equity the plaintiff is a purchaser, and her claim for the purchase money loaned to Eugene McCallister is equally as much entitled to protection, and her interests as much opposed to a merger, as Eugene McCallister's claim for the same money would have been, had he furnished it himself. She had the same equities he would have had, if he had advanced the purchase money. This invests her with the same rights and priorities and entitles her to be paid before the appellant, nor does it work any injustice to the appellant, for it only preserves that order of priority which existed when the mortgage was executed and of which it had full notice.

Thus far we have conceded the assumption of counsel for the appellant that the service upon Reid in the Dickson foreclosure was not service upon the appellant, and that as to it the proceeding was a nullity, for the purpose of showing that there is no equitable principle which can be applied to push this junior incumbrance in front of the prior lien, or supersede the equitable rights arising under it. The fact is, the contention of counsel necessarily assumes the existence of an outstanding intervening interest or lien which is opposed to the foundation of merger. We must now examine the right of the appellant with respect to its co-defendant.

The facts show, as is alleged in the answer of the Dundee Co., appellant, that this mortgage was made to Wm. Reid, manager, but

it was, in fact, for the Dundee Co., and that Reid assigned it to the company, January 20, 1880, but that the assignment was not recorded. Subsequently, in February, 1881, the Dickson mortgages were foreclosed, and Reid being the ostensible owner of record, was made a party and made default. Yet, after this assignment and these foreclosure proceedings had taken place, and while Reid was still the agent or trustee of the company, in September, 1881, he brought suit in the United States court, in his own name, as manager, to foreclose this same mortgage. In that suit the regularity of the proceedings and the service upon Reid in the Dickson foreclosure is alleged, and the recitals of the record expressly declare that the rights of the Dundee Co. were foreclosed and barred so far as the two hundred and twenty acres are concerned, and a decree is entered in conformity therewith. The company thus sues in the name of Reid after the assignment, and by virtue of his relations to act for them. As disclosed by this record, there can be no doubt that Reid had control of the business of the company in Oregon, and the possession of the property, with authority to transact such business and to hold the legal title to such property in his own name, and in all respects to deal with it as his own, so far as third persons or parties are concerned. This is not the case of an assignment to a stranger, and then afterwards the assignor being impleaded as a junior encumbrancer by a prior mortgagee, and subsequently brings suit in his own name on the mortgage which he had previously assigned; but that of the agent or trustee of the party, made such ostensible owner of record by such party, and with authority by virtue of his relation to act in the premises.

The difference is manifest, the act of Reid was the act of the principal or bound the principal. If he was endowed with capacity to sue as the owner, as he did, his act was the act of the principal and made him a proper party to the prior proceedings in the foreclosure. The transaction seems to be susceptible of no other construction, and to hold otherwise would work a manifest injustice, if not a fraud. It certainly ought not to be allowed to take advantage of its own act, and claim that it had no notice of the Dickson suit, when the party to the record, and the same party it had placed upon the record as owner of this mortgage, was impleaded in the suit and made default. There was in fact but one interest and that Reid was made to represent. Mr. Jones says: "It has been held in some cases, however, that as trustee and *cestui que trust* represent but one interest, he alone should be made a party to the suit as he would be the party entitled to redeem."

The facts of this case are such, that we think it would be inequitable to allow the appellant to take this advantage, and until better advised, the decree must stand.

THAYER, J., concurs in the result, but does not agree in the conclusion that the recording acts of this state do not extend to assignments of a mortgage.

WALDO, C. J., absent.

SAVAGE *v.* SAVAGE.

Filed November 16, 1885.

VENDOR AND VENDEE—VENDEE'S DUTY TO DISCLOSE.—Ordinarily where there is no fiduciary relation between the vendor and vendee of land, and no confidence is reposed by the vendor in the particular contract, no duty rests upon the vendee to disclose facts he may happen to know advantageous to the vendor.

THE SAME—PURCHASE BY ATTORNEY IN FACT—CONCEALMENT BY ATTORNEY.—An attorney in fact to collect debts due and lease the lands of another, in whom particular trust and confidence is imposed by the principal, cannot purchase the lands of the latter without disclosing to the principal every fact within his knowledge that would tend to enchance its value.

A PURCHASE MADE WITHOUT such disclosure will be set aside at the instance of the principal.

APPEAL from the circuit court of Marion county. The opinion states the facts.

N. B. Knight, for the appellant.

Tilmon Ford, for the respondent.

THAYER, J. This appeal is from the circuit court for the county of Marion. The appellant commenced a suit in that court against the respondent to have a certain deed executed by the former to the latter, on the third day of October, 1882, to certain lands in said county, cancelled, and said lands reconveyed to her. She alleged in her complaint that on and prior to the third day of October, 1882, she owned said lands in fee, that in April, 1882, she executed to the respondent a power of attorney appointing him her attorney in fact to take possession, and have charge of said lands, to sell the same, execute deeds to purchasers, and do all acts necessary to carry out said power; that after executing said power of attorney, she left the state and went to Kansas City, Mo., where she remained until April, 1884; that on or about the first of October, 1882, she received through the mails an offer from the respondent of six thousand dollars for the whole of said lands, and desiring to sell the same, and not knowing at the time that any greater sum of money could be obtained therefor, and relying upon the respondent's honesty and good faith, she accepted the said offer, and made him the deed; that the respondent knew that he had been offered for, as appellant's agent, before, and was offered at the said time, and could have sold one of the parcels of the lands, a certain one hundred and twenty-four acre tract, for the sum of six thousand dollars cash, and could have sold the whole of said lands for eight thousand dollars cash; that they were reasonably worth that sum, and that he fraudulently concealed from the appellant said facts and by reason of such suppression obtained from her the said deed; that she had after learning of the fraud offered to return him his money and had demanded a reconveyance.

The respondent denied the allegation of the complaint as to his attorneyship, the offer, value of the land, and fraud, and alleged affirmatively that since he purchased the land he had paid out for taxes the sum of one hundred and fifteen dollars.

Depositions and proofs having been taken, the case was heard by said circuit court and the complaint dismissed, from which decision

the appeal was taken to this court. It appears, from the testimony and proofs, that the appellant was born and raised upon the lands in question; that about 1875 she married and went East with her husband; that, her husband having obtained a divorce from her in 1881, she returned and lived with her uncle, John Savage, jr., on the lands until April 5, 1882, when she went back to Kansas City, Mo., where she resided, as alleged in the complaint; that she and the respondent are second cousins; that she was the owner of the lands; that about the sixteenth day of September, 1880, she executed to the respondent the following power of attorney:

"Know all men by these presents that I, Bertha E. Savage, of Junction City, Kansas, have made, constituted and appointed, and by these presents do make, constitute and appoint, John Savage, sr., of Salem, Marion county, Oregon, my true and lawful attorney in fact for me and in my name, place and stead, and for my use, to ask, demand, sue for, collect and receive and receipt for all such sums of money which now or shall be or hereafter are owing or belonging to me in the state of Oregon by any person or persons whatsoever; and I hereby further authorize and empower my said attorney in fact to lease or rent any and all lands now owned by me, or which I may have any interest in, in the said state of Oregon, and to collect the rents therefor, and to do everything in and about the premises as fully to all intents and purposes as I could or would do if personally present (with full power of substitution or revocation), hereby ratifying, confirming and holding valid all that my said attorney shall lawfully do or cause to be done by virtue of these presents. In witness whereof, I have hereueto set my hand and seal this —— day of ————, A. D. 1880. BERTHA E. SAVAGE. [SEAL.]

"Done in presence of Arthur P. Davis."

That the respondent accepted the trust and acted under said power of attorney until the execution of the deed sought to be cancelled. It is claimed by the appellant that there was a subsequent power of attorney executed by her to the respondent in April, 1882, empowering him to sell and convey the property as alleged in the complaint, but that is stoutly denied by the latter, and, in the opinion of all the members of the court, is not sustained by the evidence.

It further appears from the proofs that the following correspondence, at the respective times therein mentioned, took place between the appellant and the respondent in reference to the sale and purchase of said lands:

"KANSAS CITY, Aug. 31, 1882.

"*Dear Cousin John:* In a letter received from Aunt Hattie a short time ago she said you were going to write and advise my selling my property there. At the time I received her letter I thought I would NEVER NEVER sell but have changed my mind. There are splendid chances here every day to invest in city residence property which would bring me each year as much as I get off from the farm in two. And more than this, property is advancing at least ten per cent each

year and in some localities fifty. I shall always hope to *some time* get the little farm back again. Please give your earliest attention—write me what you will give me for it in cash and to facilitate matters I will answer your letter by telegram if I accept your proposition; and any way that you can hurry the matter along do so.

"Hope this will find you all well and in the midst of a bountiful harvest with favorable weather to assist in securing it.

"If I thought Ma could pay me cash for the place, and as much as anyone else would be willing to pay for it, she would be the one I would write to of my desire to sell; for I remember she once said if I sold she would like to buy it from me; and it is only natural that she should want it. Let me hear from you as soon as possible. I am real well and enjoy myself sometimes. Have been at work this summer you know. When you write address me at Kansas City, Missouri, as I get my letters at the post office. With kind regards I am Yours, etc., BERTHA SAVAGE."

The following is the respondent's answer to the above:

"SALEM, Sept. 11th, 1882.

"*Dear Cousin:*—I received yours of the thirty first yesterday and was glad to hear you was well. I did not tell Hattie I was going to advise you to sell; I told her if I could not make the land fetch in more profit, you had better sell it. I only got three hundred and sixty bushels of oats and sold them for thirty-seven and one-half cents per bushel and one hundred and thirty bushels of wheat. I shall sell it as soon as hauled, then I will pay Ford and Stratton and will send you what is left. I had not thought of buying your land. I was going next week to Walla Walla with my money, for I can't let it out here any more only in small dribbs. So if you conclude to take me up at my offer I won't go; I will give you six thousand dollars for your whole interest here; at that it will be a good while before I could get my money back. If you conclude to take me up at my offer, telegraph immediately. John is talking of buying the two other heirs out on the Miller place—the two hundred and fifteen acres—for three thousand six hundred dollars. If he had not of bought the one, I would of bought it, for it is cheaper than yourn, bein more land and laying together. We are all well and hope you the same. John had more wild oats than any thing else and if it ain't summer fallowed, it won't pay taxes and keep fences up. If you take me up, I will send you a check on any bank you say. I would of written before but I wanted to see how much grain you would have.

"From your friend. Write often. Yours &c. JOHN SAVAGE."

On the same day the letter was mailed, the respondent notified the appellant of it by telegraph as follows:

"SALEM, OREGON, Sept. 11th, 1882.

"*Bertha E. Savage:*—I have written you an offer of six thousand dollars for your full interest here. If you accept, telegraph immediately. JOHN SAVAGE."

On September 18, 1882, the appellant telegraphed her acceptance of the offer as follows:

"KANSAS CITY, Mo., 18th Sept., 1882.

"*John Savage*, P. O. 330, SALEM:—I accept your offer; hurry papers along soon as possible. BERTHA SAVAGE."

On September 22, 1883, the appellant also wrote the respondent, in which she gave directions about sending the money, and in which she requested that he would send her five hundred dollars, without waiting for the deeds to be sent there, signed and returned again. She also suggested that it would probably have been better if she had sent him a quit-claim deed—that it would have expedited the affair. The respondent upon receipt of the appellant's telegram accepting his offer, had Judge J. J. Shaw, of Salem, prepare a deed and forward it to the appellant at Kansas City, for execution, which she did at the time before mentioned, October 3, 1882, and sent it to the respondent by mail.

The appellant's counsel contends that at some period between the time the respondent received the appellant's letter of August 31, 1882, and the date of his reply thereto, September 11, 1882, a gentleman by the name of Durbin, who owns land adjoining the said one hundred and twenty-four-acre tract, applied to the respondent to purchase said tract, and thereupon offered to pay therefor the same amount, six thousand dollars, that the respondent paid for all of appellant's lands, including said tract; that instead of informing the appellant that Mr. Durbin would pay said sum for said tract, the respondent took advantage of the circumstances and made said purchase, and thereby obtained the other lands, a reversionary seventh interest in a tract of three hundred and fourteen and forty-six one-hundredths acres, subject to the dower right of Mrs. M. J. Savage, a widow lady, and seventy-eight and eighty-one one-hundredths acres of timber land, alleged to be worth two thousand dollars, for nothing.

There is some contradiction as to the time when Mr. Durbin made said offer, and as to the quantity of land that was included in it. He was examined as a witness in the case, and testified to the following, viz.:

"Age, fifty-four years; occupation, stock-raiser; residence, Wasco county, Oregon." In answer to question three he says:

"I know the one tract of one hundred and twenty-four acres, and know about where the timber land is, and the dower property. They are situated on Salem Prairie—that is, the dowery and the one hundred and twenty-four acres; the other is back in the timber, east of the other property.

"Q. 4—You may state if you ever had any conversation with the defendant about the purchase of either of those tracts of land.

"Ans.—I had a conversation with Mr. Savage, I think sometime along about the first of September, 1882, about the tract of land—one hundred and twenty-four acres. I came to town and heard Mr. Savage wanted to see me; I enquired and looked for Mr. Savage,

and found him on Commercial street. I says, Mr. Savage, I understand you want to see me. He says yes, I wanted to know if you want to buy this piece of land or place of Bertha Savage. I says, I don't know whether I do or not; it is owing to what she asks for it. Well, he says, what will you give for it? I asked him how much there was of it. He says there is one hundred and twenty-five acres of it. I studied a bit and says, I will give you five thousand five hundred dollars for it, and he says I don't think she will take that for it. We talked and had some conversation about that and other matters, and I finally told him that I would give six thousand dollars for it if he would telegraph and get me an answer in a short time. He said he thought she would take that for it; and agreed to telegraph to her. I saw him a day or two after that, and I asked him if he had telegraphed to her, he said that he hadn't; that he had written to her; that he couldn't explain things to her as he would like to in regard to the fencing and condition the place was in, but he said I need not be uneasy, that I would get the place; that is, that she would accept my offer. I then, sometime after that, asked Mr. Savage if he had heard from Bertha, and he told me that he hadn't. One day I happened to step into the bank; Mr. Savage was in there doing some business with Mr. Alberts. I stood there till they got through their business. From the conversation they were having, I suspicioned that all wasn't right, and asked John Savage if he had heard from Bertha. He said he had, and was just sending her the money for the land. I says to him I don't want you to send any money for me, as I have the money to pay for it myself, and he says I may let you have it yet, and I asked him if he didn't calculate to let me have the land—got into quite a little jower over it. During this time I had heard that she had eighty-seven acres out in the timber, and a dower of forty acres in Mrs. Lute Savage place. I says to Mr. Savage, I am a little ahead there. Mr. Savage says to me, I have done so much for Bertha, and I told him that I would give him two hundred and fifty dollars for his trouble and expense, besides the six thousand dollars. All the answer that Mr. Savage would make me was that 'I may let you have it yet.' I then told him that he was getting this seventy-eight acres out there in the timber and the dower for what I had offered for the one hundred and twenty-five acres, and he says, 'I know my own business; I may let you have it yet.' I says to him, I will give eight thousand dollars for the whole of it, and I will give you two or three days—I don't recollect just how long—to let me know whether you will let me have one hundred and twenty-five acres or not. If you don't I will telegraph to Bertha to not accept your checks; that I will give eight thousand dollars for it. At the length of time that I had given him for an answer he came out to my place, two and one-half miles east of Salem—it was after dark when he came there—and I asked him him if he had been to supper, we had just get through, and he said he hadn't and they fixed him a bite of supper, and after that we sit and talked for about an hour over matters and things. Mr.

Savage spoke about going home; I says you had better stay all night; he says no, 'but Sol., I would like to see you a bit.' We got our hats and went out to the gate between the house and the road, and Mr. Savage says, 'I will let you have that place—that piece of land, and make you a deed to it as soon as my wife comes home.' She was in the East, I believe. Well, I says, that is all right John; but he says there isn't quite so much of it as I thought these was, only one hundred and twenty-four acres. I says that don't make any difference—one acre don't make any difference. I says here is twenty dollars, you take that John; he says there is no use of that, I give you my word you shall have it; I said your word has always been good to me, but we have had a little dispute about this. He says: 'It will be all right, and I will make you a deed when my wife comes home.' Mr. Savage went home, I suppose. There was nothing more said. I have heard that Mrs. Savage was home. I went down there to Mr. Savage's, Mr. Savage wasn't at home; I left word that I would like to see him—would like to have him come up. Mr. Savage didn't come and I left word a second time. Mr. Savage came up and said if I would come into town on such a day he would make out the deed. I went in on the day that was appointed, met Mr. Savage—nothing said—we passed one another; it ran along until it was getting along in the afternoon; I looked around and found Mr. Savage, and told him he had better make out that deed and fix up our business. He then told me that his wife would not sign the deed unless he would give her one thousand dollars. We had a few words and that ended our business.

"Q. 5.—You may state whether, at the time you met the defendant in the bank here, when he was preparing to send the money to the plaintiff for her lands, you offered and would have paid to him in cash eight thousand dollars for the three several tracts of land described in the complaint, and which you have mentioned?

"Ans.—I would have given eight thousand dollars for it; I believe I offered Mr. Savage that, less the two hundred and fifty dollars that I had offered him as bonus on the six thousand dollars.

"Q. 6.—You had offered the defendant, then, six thousand dollars for the one hundred and twenty-four acre tract, and two hundred and fifty dollars besides, to pay him for his trouble and expense that he has been to; is that the fact or not?

"Ans.—Yes, that's the fact.

"Q. 7.—During any of the time that you were negotiating with the defendant for the purchase of the one hundred and twenty-four acre tract, did he state to you whether he had the power from the plaintiff to sell the same?

"Ans.—He did; he said at the time we first talked of the trade he could make me a deed himself, but he would prefer that she would do it. The conversation I had with Mr. Savage in the bank here was in Bush's bank, Mr. Alberts was behind the counter, and I forget who the other man was."

"Cross-examination. Q. 9.—State, Mr. Durbin, just what passed between you and Mr. Savage in Mr. Bush's bank in Mr. Alberts' presence at the time you have referred to.

"Ans.—Well, I asked Mr. Savage if he had heard from Bertha; he said that he had, that he was just sending her the money for the land; I says, Mr. Savage, I don't want you to send any money for me, I have got the money myself; he says, well, I may let you have it yet; and the conversation went on; I don't recollect what all was said, but I told him that if he didn't give me an answer in two or three days that I would telegraph to Bertha not to accept his money for the land, that I would give eight thousand dollars for it, and that I would give him two or three days, I think, to give me an answer.

"Q. 12.—Did you not go to John Savage, Jr., a short time after you found you couldn't get the land and try to get him to go in with you and help bust up the plaintiff's deed to the defendant for the land in dispute?

"Ans.—I did not; but I went to John Savage, Jr., and told him what I had offered Mr. John Savage here, the defendant, and what I understood he was getting for what I had offered for the one hundred and twenty-four acres, and as it was a brother's child, that I thought it was his duty to look into it, and told him that anything I could assist him in I would do so, as I always thought a great deal of her father Lute. Mr. Savage says to me, John Savage has a mortgage on my farm of two thousand dollars and I am afraid to have anything to do with it. I told him other men had money as well as John Savage."

The respondent was examined as a witness, and testified that the first conversation between him and Mr. Durbin in regard to the sale of the land took place on the seventeenth or eighteenth day of September, 1882, the day before appellant accepted his offer, and that Mr. Durbin's proposition was to purchase all of appellant's lands; that it included the three parcels referred to, the same land respondent purchased from appellant. The court has considered this question of fact fully and concluded that the weight of the testimony upon the question is in favor of the appellant. Mr. Durbin's testimony seems to be corroborated by the circumstances, and also by the testimony of other witnesses, and while it may not be accurate in all its particulars, or invulnerable to criticism, still I think he made the offer to buy the one hundred and twenty-four acre tract of land, and to pay the six thousand dollars therefor, and that the offer was made before there was any acceptance of respondent's offer made to appellant, by the letter of September 11, 1882, and most probably before that offer was forwarded to her.

If this be the correct view of the facts, it becomes important to inquire whether the respondent was under any legal obligation to inform the appellant of Durbin's offer for the said parcel of land before purchasing it himself in the manner he purchased it. Ordinarily, where there is no fiduciary relation between the parties, and

no confidence is reposed by the vendor in the particular contract, no duty rests upon the vendee to disclose facts he may happen to know advantageous to the vendor. It is said in 2 Sugden on Vendors, 406, that it may be laid down as a general proposition, that trustees who accepted the trusts, unless they are nominally such, as trustees to preserve contingent remainders, agents, commissioners of bankruptcy, assignee of bankrupts or of insolvents, whilst the distinction remained, or their partners in business, solicitors to the commission, auctioneers, creditors who have been consulted as to the mode of sale, counsel or any person, who, by being employed or concerned in the affairs of another, have acquired a knowledge of the property, are incapabale of purchasing such property themselves, except under certain restrictions." The agency of the respondent only empowered him, first, to collect any and all money due the appellant in the state of Oregon; and second, to lease or rent any and all lands then owned by her, or in which she had any interest, in said state, collect the rents therefor, and do everything in and about the premises as fully, to all intents and purposes as she could or would do if personally present; and the question arises whether he, by virtue of such relation, was under any obligation to disclose the fact of said Durbin's offer, when the appellant proposed to him to become a purchaser of the property.

Mr. Pomeroy, in his work upon Equity Jurisprudence, sec. 902, says that "all the instances in which the duty exists, and in which concealment is, therefore, fraudulent, may be reduced to three distinct classes. The first class includes all those instances in which, wholly independent of the form, nature, or object of the contract or other transaction, there is a previous existing definite fiduciary relation between the parties; so that the obligation of perfect good faith and of complete disclosures always arises from the existing relations of trust and confidence, and is necessarily impressed upon any transaction which takes place between such persons." And he gives as examples, contracts and other transactions between a principal and agent, a client and attorney, a beneficiary and trustee, a ward and guardian, and the like. "The second class embraces those instances in which there is no existing special fiduciary relation between the parties, and the transaction is not in its essential nature fiduciary, but it appears, that either one or each of the parties in entering into the contract, or other transactions, expressly reposed a trust and confidence in the other, or else from the circumstances of the case, the nature of their dealings or their position towards each other, such a trust and confidence in the particular case is necessarily implied. The nature of the transaction is not the test in this class." "The third class includes cases where the contract or other transaction itself, in its essential nature, is intrinsically fiduciary, and necessarily calls for perfect good faith and full disclosure without regard to any particular intention of the parties." And he gives the contract of insurance as an example falling within that class.

The respondent was the agent of the appellant for a certain purpose, but it is doubted whether it was such an agency as is contemplated in the proposition laid down in Sugden, or as comes within the first class of cases mentioned by Prof. Pomeroy. That depends upon what the reason or foundation of the rule is, which incapacitates or restricts the right of the party to purchase the property in such cases. If it is solely because the agent is under an existing contract with the principal to aid and assist him to the best of his ability in the disposal of the property, then I would suppose that a mere agency to rent property and collect and pay over the proceeds would not preclude the agent from purchasing it as freely as a stranger might do. The agent, in such a case, does not contract to discharge a duty connected at all with the sale of property. But if the obligation arises out of the trust and confidence which the relation shows was reposed in the purchaser by the vendor, then it is immaterial whether the authority empowered the purchaser to sell or rent the property. The relation proves a trust and confidence in either case. In the case of attorney and client, I apprehend that it would make no difference, if the former purchased property of the latter, whether he was employed in a matter concerning the property, or concerning some other affair of the client; that he would be as much obligated in the one case as the other to disclose every fact that would tend to enhance its value, and that the reason therefor would be the trust and confidence arising from the relation of the parties. But, whether from such a character or not, that is certainly the reason why a guardian cannot purchase property from his ward; but whether the relation between the respondent and appellant was of such a character or not, their position towards each other was such, that a trust and confidence in the particular case is implied.

The parties are relatives; the appellant was living out of the state; she had made the respondent her agent, as before mentioned, and he was acting in that capacity when the offer of Durbin was made for the property. And I think, under those circumstances, it was his duty to have informed the appellant of the offer. It is true she wrote him to make her an offer, but it is evident, from the tenor of her letter, that she expected to get as much from him as any one else would give. She says in her letter of August 31, 1882: "If she thought Ma could pay her cash for the place, and as much as any one else would be willing to pay for it, she would sell it to her." She did not intend to let it go to any one for less than it would bring, and if the respondent had communicated to her the offer Durbin had made, she certainly would not have accepted the respondent's offer. The tenor of the respondent's letter was calculated to induce her to accept his offer. It contained a statement of the yield of the land that season, and the account was far from encouraging; besides, it conveyed the idea that if he made the purchase it would be a very slow investment, says, "I will give you six thousand dollars for your whole interest here; at that, it would be a good while before I could get my money back." Now, if Durbin had already made him an

offer of the same amount of money for the one hundred and twenty-four acre tract alone, as I am inclined to believe, from the testimony, he had, the statement was not candid. He should, in any event, have communicated to the appellant the fact of Durbin's offer; though made after he transmitted his proposition to purchase, he acquired the knowledge of the fact from his connection with her affairs, and honesty and fair dealings, under the circumstances of the case, required him to give the information. The parties were not dealing "at arms length," nor upon an equality of footing. The respondent was upon the ground, and had the management and control of the premises, and the appellant, as between her and the respondent, was entitled to receive therefor all that any person would pay, and, no doubt, believed, when she accepted the offer and executed the deed, that she was obtaining as high a price for her lands as any one else would be willing to give.

I think the said deed should be cancelled upon the appellant's doing equity. She must, of course, first restore to the respondent what he has paid her, the six thousand dollars. Her attorney made some kind of written offer before the suit was commenced, to pay him back the money, less one thousand two hundred dollars—the rental value of the premises, but I do not think the offer was sufficient. She had had the use of the money, and that in my opinion, was worth as much or more than the use of the lands; consequently she should not be allowed costs. The respondent claims to have paid taxes upon the property, but the taxes upon the money which she was liable to pay, and probably did pay, is a fair stand-off. The respondent should have interest upon the six thousand dollars, at the rate of eight per cent per annum, and be charged with the rents and profits amounting to dollars.

The decree should be that upon the appellant's paying to the respondent the sum of six thousand dollars, and interest at the rate aforesaid, less rents and profits, within ninety days from the date of the entry of the decree in this court, with interest thereon at the rate of eight per cent per annum from the date of such entry, the respondent reconvey to her the entire lands conveyed to him by the said deed. That the deed of reconveyance contain a covenant against any acts of the respondent, done or suffered, except the non-payment of taxes levied during the year 1885, and that the original deed from the appellant to the respondent be thereupon set aside and cancelled. The respondent could, after the suit was begun, have made an offer under section 511 of the civil code, to allow a decree to be given against him for the relief granted herein, and have recovered costs from the time of the service of the offer, but not having availed himself of the benefit of that provision, he should not be entitled to recover costs. Neither party, therefore, will be allowed costs or disbursements in either court, but each shall pay one-half of the disbursements incurred therein.

NOTE.

DEALINGS BETWEEN PRINCIPAL AND AGENT.—The relation existing between a principal and his agent is fiduciary in its character; and it is a well established principle, both at law and equity, that an agent cannot, in a matter connected with his agency, place himself in a position hostile to his principal, so as to derive any personal gain from the subject matter of the agency: Dodd v. Wakeman, 26 N. J. L., 484; Wilson v. Wilson, 4 Abb. App. Dec., 621, Eldridge v. Walker, 60 Ill., 230; Marvin v. Buchanan, 62 Barb., 468; McMahon v. McGraw, 26 Wis., 614; Moinett v. Days, 57 Tenn., 431; Kerfoot v. Hyman, 52 Ill., 512; White v. Ward, 26 Ark., 445; Leake v. Sutherland, 25 Ark., 219; Comstock v. Comstock, 27 Barb., 453. Thus an agent cannot purchase an interest in the property of his principal, where he has a duty to perform inconsistent with the character of a purchaser, or speculate with the property committed to his care. If employed to purchase, he cannot make himself the vendor; if he does so, the sale is voidable at the option of the principal, and equity will hold the agent as the trustee for the principal, and compel him to make a conveyance, or to account to the principal for the profits obtained; or in an action by the agent to enforce the sale, the principal may disaffirm: Grimley v. Webb, 44 Mo., 444; Rhea v. Puryear, 26 Ark., 344; White v. Word, 26 Ark., 445; Krutz v. Fisher, 8 Kans., 91; Fisherv. Krutz, 9 Kans., 50; Gilwaters v. Miller, 49 Miss., 150; Jefferies v. Weister, 2 Sawy., 135; Bruce v. Davenport, 36 Barb., 349; McDonald v. Fithian, 6 Ill., 269; Copeland v. Mercantile Ins. Co., 6 Pick., 198; Sturdevant v. Pike, 1 Ind., 277; Church v. Sterling, 16 Conn., 388; Moore v. Moore, 5 N. Y., 256; Banker v. Judah, 8 Conn., 145: Firestone v. Firestone, 49 Ala., 128; Wilber v. Hough, 49 Cal., 290; Armstrong v. Elliott, 29 Mich., 485; Bain v. Brown, 56 N. Y., 285; Tynes v. Grimstead, 1 Tenn. Ch., 508; Barziza v. Story, 39 Tex., 354; Rogers v. Lockett, 28 Ark., 290; Dodd v. Wakeman, 26 N.J. Eq., 484; Hughes v. Washington, 72 Ill., 84; Bowman v. Officer, 53 Iowa, 640; Deep River, etc., Co. v. Fox, 4 Ired. Eq., 61; Segar v. Edwards, 11 Leigh., 213; McKinley v. Irvine, 13 Ala., 681; Shannon v. Marmaduke, 14 Tex., 247. This rule applies although the agent may have contributed his own funds or responsibility in producing the result, and no risk or expense was incurred by the principal: Dutton v. Willner, 52 N. Y., 313; Ackenburgh v. McCool, 36 Ind., 473; Bair v. Brown, 7 Lans., 506. So, also, an agent to sell at a stipulated price, cannot become the purchaser, although he buys for a sum within the limits specified: Armstrong v. Elliott, 29 Mich., 485; Ruchmann v. Bergholz, 37 N. J. L., 437; and conversely, an agent to purchase cannot become the seller, without notice to and consent by the principal, although he sells for no more than the market price: Conkey v. Bond, 34 Barb., 276; Tewksbury v. Spruance, 75 Ill., 187; nor can an agent to insure become the insurer: Kean v. Brandon, 12 La. Ann., 20. Where an agent is the purchaser, the principal may elect to be bound or not by the sale: Mealor v. Kimble, 2 Murph., 272; James v. Acre, Minor, 141. Thus, where a broker, having stocks of his principal in his hands, transfers them to himself, without authority, and subsequently sells it for an advance, the principal can either adopt the sale and charge the broker with the profits, or can sue in trover for damages for the conversion; but he cannot charge the broker either as purchaser, or as guilty of conversion, and at the same time treat the stock as unsold, and for that reason ask for an account: Taussig v. Hart, 49 N. Y., 301; Lawrence v. Maxwell, 6 Lans., 469. If, however, in a dealing between the principal and agent, the latter communicated, in good faith, every fact material to the transaction, within his knowledge, to the principal, and paid a valuable consideration, and the principal, on his part, acted with full knowledge, and consented, the presumption of fraud on the part of the agent is overcome, and the transaction will be upheld: Fisher's Appeal, 34 Pa. St., 29; Farnam v. Brooks, 9 Pick., 212; Marshall v. Joy, 17 Vt., 546; Young v. Hughes, 32 N. J. Eq., 372; Walker v. Carrington, 74 Ill., 446; Wilson v. Wilson, 4 Abb. App. Dec., 621; Brown v. Post, 1 Hun., 303. And, if such conditions exist, a gift by a principal to his agent will be upheld: Hunter v. Atkins, 3 My. & K., 113; Nicol v. Vaughan, 1 Cl. & Fin., 495; Hobday v. Peters, 28 Beav., 349. After the agency has terminated, the parties thereto may deal with each other, unrestricted by the foregoing rules: Scott v. Dunbar, 1 Moll., 442; Bucher v. Bucher, 86 Ill., 377. But even then a prior agent cannot use special knowledge which he has acquired by means of the agency, for his own benefit, and to the prejudice of his former principal: Carter v. Palmer, 8 Cl. & Fin., 657; Holman v. Loynes, 4 DeG. M. & G., 270.

POWELL *v.* DAYTON, SHERIDAN AND GRANDE RONDE R. R. CO.

Filed November 17, 1885.

CONTRACT FOR SALE OF LAND—TENDER OF DEED BY VENDOR.—A vendor, under a contract for the sale of real estate, is entitled to maintain an action at law for the recovery of the purchase price, if he executes and tenders a deed, at the proper time, and keeps the tender good, by bringing the deed into court.

THE SAME—DESTRUCTION OF SUBJECT MATTER EXTINGUISHES CONTRACT.—A vendee under such contract is relieved from his obligations, if prior to the time of performance, the property contracted to be sold has been destroyed.

THE SAME—CONCURRENT CONDITIONS—PERFORMANCE.—A vendor's covenant to convey and a vendee's covenant to purchase, are dependent and concurrent, where the act of each is to be performed at the same time. And a tender of a deed by the former, long after the time stipulated for performance, is not sufficient to sustain an action for the purchase price.

APPEAL from Yamhill county. The opinion states the facts.

E. C. Bronaugh, for the appellant.

James K. Kelly, for the respondent.

WALDO, C. J. This is an action brought by the vendor of real estate against the vendee for breach of a written contract to purchase the estate.

1st. On the first day of July, 1878, the plaintiff leased the premises to the defendant for the term of five years, at the monthly rental of fifty-five dollars, and the lease contained the further provision, and the defendant agreed "to purchase of said Powell, and pay the said Powell, on or before the expiration of the said term of five years, the sum of five thousand five hundred dollars in United States gold coin, for all the said warehouse property," etc. The plaintiff alleges that he made out and tendered a deed to the defendant on the tenth day of November, 1883, and assuming thereby to have performed all conditions precedent on his part, claimed the entire purchase price. There is good authority for the position that in an action at law the vendor of real estate may recover the contract price if he shall make out and tender a deed at the proper time, and, it should seem, keep the tender good by bringing the deed into court: 1 Sedgw. on Dam., 386, and fol.; Curran v. Rogers, 35 Mich., 221.

Counsel for plaintiff did not urge the point, however, at the trial, and made no objection to the direction of the court to the jury, to the effect that the loss of the bargain was the measure of damages. The court also directed the jury that the washing away of the warehouse before the time for the performance of the contract had arrived did not affect the plaintiff's right to recover, unless the loss happened through the plaintiff's negligence. These instructions are alleged as error. The defendant's counsel do not seem to have taken the position in the court below, that the destruction of the warehouse determined the contract. That, however, is the position here, and must be considered.

In every contract for the conveyance of property, there is an implied condition that the subject matter of the contract shall be in existence when the time for the performance of the contract arrives. That is the contract, the understanding of the parties. If it has

ceased to exist when that time arrives, each party is discharged from his contract, the vendor from his contract to convey, the vendee from paying the purchase price. The rule: "When property, real or personal, is destroyed by fire, the loss falls on the person who is the owner at the time; and if the owner of the house and land agrees to sell and convey it upon the payment of a certain price, which the purchaser agrees to pay, and, before full payment, the house is destroyed by accidental fire, so that the vendor cannot perform the agreement on his part, he cannot recover or retain any part of the purchase money:" Wells v. Colman, 10 Mass., 514; Gould v. Murch, 70 Maine, 288; Thompson v. Gould, 20 Pick., 134; Taylor v. Caldwell, 3 B. & S., 826; Appleby v. Meyers, L. R., 2 C. P., 651; Dexter v. Norton, 47 N. Y., 62; Brumley v. Smith, 3 Ala., 143, cited by counsel, Appleby v. Meyers, above.

Several cases in equity were cited by the plaintiff's counsel to show that the defendants were the equitable owners at the time of the loss. Under the terms the contract this is very doubtful; but if it were true, it would make no difference here, unless such an estate were recognized at law, which it is not.

2. The covenants in the agreement are dependent and concurrent where the act of each party is to be done at the same time. A mere readiness to perform at such time is not sufficient, but the plaintiff must aver a tender of performance on his part: Williams v. Healy, 3 Wend., 367; Johnson v. Wygant, 11 Wend., 49; Green v. Reynolds, 2 John., 207; Adams v. Williams, 2 W. & S., 228. The plaintiff has, indeed, made a tender of a deed, but not until long after the time fixed by the parties for the performance of the contract. The breach on the part of the defendant, if any, should have occurred at that time. The plaintiff has not the power to keep the contract open, and to tender a deed months after the first day of July, 1883, and then allege a breach as occurring at the time of the tender. This would be to alter the terms of the contract: Thompson, J., Bank of Columbia v. Hagner, 1 Pet., 465.

This point was made on the part of the defendant at the argument, though it seems to have been overlooked at the trial. As it must be fatal if the case comes again before the circuit court, it will be useless to direct a new trial.

Judgment reversed.

THAYER, J. I concur in the opinion delivered in this case, that the respondent cannot recover unless the destruction of the warehouse was occasioned by the act or neglect of the appellant. I believe that it is supported by reason and authority, although I was slow in arriving at that conclusion.

As to the question of construction of the contract of May 24, 1878, I am unable to concur in the view the majority of the court have expressed. When the case was argued, I was inclined to the opinion that the payment of the purchase price for the premises, and the execution of the deed were intended to be concurrent acts,

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but upon more mature reflection, I have concluded that the appellant was obligated to pay the purchase money absolutely, at all events, unless the respondent, by some act on his part prevented it. I am satisfied that the latter is not required to execute the deed until the appellant pays the money. By the terms of the contract, the respondent agreed to lease to the appellant the premises for five years, commencing on the first day of July, 1878. In consideration of which the appellant agreed to pay the respondent for the rent and use thereof the sum of fifty-five dollars per month, and further agreed to purchase them of the respondent and to pay him therefor on or before the expiration of said term, the sum of five thousand five hundred dollars. The respondent agreed that upon such payment being made, he would make and deliver to the appellant a good and sufficient deed to the premises in fee simple. In pursuance of that contract the appellant entered upon and enjoyed the use and occupation of the premises during the term of said lease and agreement.

It is conceded by the authorities that covenants are to be construed to be either dependent or independent, according to the intention and meaning of the parties, and the good sense of the case, and that technical words should give way to such intention. In the note to the somewhat ancient case of Pordage v. Cole, 1 Saund., 320, certain rules are laid down by which such intention may be ascertained and discovered; and they have been so often recognized and approved by the courts that they have become maxims in the law. Among said rules is the following: "3. Where a covenant goes only to a part of the consideration on both sides, and a breach of such covenant may be paid for in damages, it is an independent covenant, and an action may be maintained for a breach of the covenant on the part of the defendant without averring performance in the declaration."

The contract between the parties in this case included the leasing as well as the purchase of the premises. The leasing for a term of five years constituted a material part of the consideration. The agreement to purchase was evidently the inducement to lease. The appellant says, by the contract, in effect, that if the respondent will lease the premises to the appellant for the term of five years, at the monthly rental of fifty-five dollars, the appellant will, on or before the expiration of that time, pay to the respondent five thousand, five hundred dollars therefor. The former, after enjoying that privilege, had no alternative but to pay the purchase price and look to the latter for the deed. The appellant had the right to pay the purchase money at any time extending through a period of five years, and it would be absurd to require the respondent to have had a deed prepared ready to deliver during all that time. It may be claimed that the rent was an equivalent for the use of the premises; but I do not know that. If the stipulation in the contract to purchase the premises had not been included in it, the respondent might not have been willing to rent for fifty-five dollars a month, or at all.

I understand the meaning of the rule I have recited, to be, that where a contract embraces two subjects, and it has been performed as to one of them, and the party has a remedy for the breach of the performance of the other, the covenants as to that are not dependent unless made so by express words or necessary implication. The payment of the money for the premises would naturally precede the execution of the deed, and after the appellant had enjoyed the benefit of a part of the contract, its obligation to perform the other part became absolute.

I am of the opinion that this case comes within the reason of said rule. I think it would be unjust to allow said appellant to enjoy the part of the contract, and not pay the purchase price of the premises as it stipulated to do, because the respondent did not come forward in advance of such payment, and tender a deed. Under the circumstances of the case, I do not believe that the respondent's obligation to tender a deed would arise until after payment of the money.

CARTER, RICE & Co. *v.* KOSHLAND.

Filed November 17, 1885.

GARNISHMENT—ORDER MUST BE SERVED ON GARNISHEE—APPEARANCE BY ATTORNEY.—An order directed to a garnishee, to answer concerning the property of a judgment debtor, alleged to be in his possession, should be served personally on the garnishee, and not on his attorney. But service made on the latter, who thereupon appears in court, and represents the garnishee on a motion for judgment, will be considered equivalent to a personal service, under section 520 of the code.

AMENDMENT OF RECORD AFTER TERM.—A court has power, after the adjournment of the term, to amend the record, so as to show that a party appeared by attorney upon the hearing of a motion.

GARNISHMENT—NOTICE NEED NOT SPECIFY PARTICULAR DEBTS ATTACHED.—Under subdivision 3, of section 147, of the civil code, to make an attachment of debts effectual, it is not necessary that the notice, to be served with the certified copy of the writ, should specify the debts supposed to be owing by the garnishee. A general notice by the sheriff that he has attached the debts, property, etc., belonging or owing to the defendant in the attachment suit, is sufficient.

THE SAME—JUDGMENT AGAINST GARNISHEE.—Under the act of October 25, 1878, where the judgment creditor has obtained a judgment that property attached be sold to satisfy his debt, he cannot obtain a general judgment against the garnishee for the amount of the debt.

APPEAL from the circuit court of Multnomah county. The opinion states the facts.

A. F. Sears and *Raleigh Stott*, for the appellant.

M. G. Munly and *E. B. Watson*, for the respondent.

THAYER, J. This appeal is from a judgment of the circuit court for the county of Multnomah, rendered in favor of the respondent against the appellant in certain garnishee proceedings.

It appears from the transcript that on the thirteenth day of May, 1885, the respondent, a private corporation, commenced an action at law against one L. H. Frank, in said court, to recover a debt of some three hundred and seventy-eight dollars and fifty-seven cents, due from the latter to the former, and thereupon sued out a writ of at-

tachment, which was issued on the next day. The attachment is in the usual form. The sheriff to whom the writ was delivered certified thereon as follows: "I hereby certify that I received the within writ of attachment on the fourteenth day of May, 1885, and executed the same on the fourteenth day of May, 1885, at Portland, in the county of Multnomah, in said state, by serving a garnishment upon Koshland Bros., as required by law, garnisheeing all debts, property, moneys, rights, dues, credits of every nature in their hands or under their control, belonging or owing to the said L. H. Frank, to which the said Koshland Bros. made an answer thereto, said answer being hereto attached and made a part of this return." The answer referred to is as follows: "I hereby return that we have no property in our hands at this time, nor have we any property, debts, money, dues, credits of any kind or nature belonging to L. H. Frank. (Signed) Koshland Bros."

There seems to have been a notice signed by the sheriff, directed to said Koshland, to the effect that, by virtue of said writ of attachment, all debts, etc., as mentioned in said return, had been attached and garnisheed, and that said answer was endorsed thereon. Said notice bore date the fourteenth day of May, 1885. Upon June 1, 1885, the said circuit court gave judgment in said action at law, in favor of said respondent, and against said Frank, for the amount of said debt, and on the ninth day of June, 1885, on motion of the respondent's attorneys, the judgment was amended by the insertion of a further adjudication, to the effect that the property of said Frank taken under writ of attachment be sold to satisfy said judgment.

Prior to the date of the amendment, on the sixth day of June, 1885, the respondent's attorney made and filed an affidavit showing that said action at law had been commenced; that the judgment therein had been recovered on said first day of June, 1885; that on the fourteenth day of May, 1885, the said writ of attachment had been issued, and in which it was stated that garnishee process was duly served upon said Koshland Bros., and answer was made by them as before mentioned; that said answer was unsatisfactory to respondent and that it was of the opinion and belief that Koshland Bros. had sufficient property in their possession and under their control belonging to said Frank to satisfy said judgment, which property was described in said affidavit, and wherein said attorney asked for an order citing the garnishee, as he termed him, to appear and be examined under oath. The circuit judge, it appears, on the same day, upon the said affidavit, made the following order: "It appearing to my satisfaction, upon the plaintiff's affidavit herein, that Koshland Bros. have property of the defendant, L. R. Frank, I hereby order that said Koshland Bros. appear before me at circuit court, department No. 1, on the thirteenth day of June, 1885, to answer concerning the same." The affidavit and order were served upon Alfred F. Sears, Jr., an attorney of the said court, who admitted service thereof in writing in the following manner:

"STATE OF OREGON, } Due and legal service of the within
"County of Multnomah. } affidavit, together with copy of same served upon me this sixth day of June, 1885, in this county and state.

"ALFRED F. SEARS, Jr., of garnishee's attorneys."

(Same venue.) "Due and legal service on me of the within order, together with copies of the same this sixth day of June, 1885, within this county and state, is hereby acknowledged.

"ALFRED F. SEARS, Jr., of garnishee's attorneys."

On the tenth day of June, 1885, the said respondent's attorneys filed in the office of the clerk of the said circuit court, written allegations in the form of a complaint, in which, among other things, is alleged the issuance of the said attachment, the service of a certified copy thereof, together with a notice, upon said Koshland Bros., whereby all debts, etc., as mentioned in said return, were duly levied and garnisheed to satisfy said judgment, and the making of the answer thereto of said Koshland Bros., which is hereinbefore set out. It is further alleged in said allegations, that said Koshland Bros. had property in their possession belonging to said Frank, and that they were holding the same to hinder and delay, etc., said Frank's creditors. Said attorney also filed a list of interrogations propounded to said Koshland Bros., regarding said property with said complaint, and upon which complaint and interrogatories was an admission of service by the said Alfred F. Sears, Jr., in the same form as upon said affidavit and order. No answer was filed to said allegations or interrogatories; and afterwards, and on the twenty-ninth day of July, 1885, the said circuit court gave judgment in favor of the respondent, and against M. Koshland, who, I understand, is Koshland Bros., for want of answer, in the sum of three hundred and seventy-eight dollars and fifty-seven cents, which is the judgment appealed from.

The appellant's counsel contended, upon the argument, that the said order should have been served upon the garnishee personally, and that no jurisdiction was acquired over the person of the garnishee by the service made upon Mr. Sears. There is no doubt about the correctness of that position; and it was conceded by the respondent's counsel upon the argument. But the latter insisted that said garnishee voluntarily appeared in the proceeding, and thereby gave the said court jurisdiction. Why an attorney should attempt to serve original process in any case, except in the manner pointed out by the civil code, is very strange, indeed. Koshland was the party required to answer concerning the property, and disobedience to the order would subject him to punishment for contempt. He was the only party to be served, and nothing less than personal service upon him should have been permitted. The first step to be taken in the proceeding was to bring him into court. After the order was allowed, the proceeding had a distinct character, and it was just as important to make personal service of process in such case as in that of the commencement of an action or suit. The service of the summons in the latter proceeding could as well be dispensed with as that of

the order in the former. If it did not appear affirmatively that Mr. Sears was, in fact, the garnishee's attorney, that they both were before the court when a motion was made for judgment and the matter was continued, as shown by the *nunc pro tunc* journal entries, for several days, upon Mr. Sears' application, and ample time given the garnishee in which to answer the allegations and interrogatories referred to, I should be in favor of a prompt reversal of the judgment, for a defect of service of the order. But it seems to me that that, under the circumstances of the case, was equivalent to personal service.

The appellant's counsel claim that an appearance in such case can only be made in the mode pointed out in the code, section 520, and that it requires a formal notice in writing to constitute such appearance. That would doubtless be so if the right of an attorney to be heard in an action, suit or proceeding were challanged by the opposing party, but where the right is conceded, the attorney has been heard, and the client has had the benefit of the hearing, the latter would not be in a very favorable position to claim that the appearance was unauthorized. The adverse party might have objected to the appearance, or have waived the objection, and if he chose to take the latter course, his opponent ought not to be allowed to complain. It is very seldom that any formal notice of appearance is served upon the opposite party in any case; and when an attorney is authorized to manage a party's legal business, and has done so, and his adversary has made no objection on account of his neglect to give written notice of appearance, the party should certainly not be permitted to take advantage of the informality.

It was urged upon the part of the appellant that the record of the court could not properly be corrected after the adjournment of the term, so as to show that he appeared by attorney at the time before referred to. It is generally agreed that courts have a continuing power over their records not affected by the lapse of time, and the more liberal rule recognizes the right to resort to any satisfactory evidence within their reach in order to ascertain the accuracy of such records. I can discover no good reason why a court cannot at any time, when the rights of third parties are not involved, so amend its records as to make them conform to the truth. There had been a neglect in this matter to record the full proceedings had when the first application was made for judgment herein for want of answer, and the court very properly ordered the record amended in that particular. At least I can discover no impropriety in doing it.

The more serious question in the case involves the right of the court to give judgment against the appellant on the garnishee proceedings. I was very strongly impressed in the outset that there had been no legal service of the said attachment. Subdivision 3, of section 147, civil code, provides how property shall be attached when in the hands of a third person. A certified copy of the writ

and a notice, *specifying* the property attached, must be left with such third person.

I could not understand how such a notice could be given unless the sheriff was able to identify the property and was loth to believe that a notice to the affect that the sheriff had attached all the debts, property, etc., as mentioned in said notice, delivered to the appellant, would answer the requirements of the statute, when it did not specify the property attached. But I find that the court of appeals of the state of New York, in O'Brien v. Mechanics & Traders F. Ins. Co., 56 N. Y., 52, has held that such a service under a similar statute, is valid. It appears that the question was for a long time a mooted one in that state, but that said decision has fully settled it. I am satisfied that the construction given in O'Brien v. Mechanics & Traders F. Ins. Co. renders the statute upon the subject more effectual, and I am inclined to follow it, though it has the appearance of judicial legislation.

The proceedings in such a case are specifically pointed out in the code of 1872, and the respondent appears to have complied with the law as it then stood. It authorized a plaintiff in such a case, when the certificate given by the person alleged to have property of the defendant in his possession was unsatisfactory, to apply for an order requiring such person to appear and be examined on oath concerning the case, and to serve upon him written allegations and interrogatories touching any of the property liable to attachment as the property of the defendant; and if he failed to answer, the plaintiff, among other things, could, at any time after the entry of the judgment against the defendant in the action, have judgment against the garnishee for want of such answer: Sections 162, 163 and 164, civil code. But the act of October 25, 1878,—providing that if judgment be recovered by the plaintiff and it appear that property has been attached in the action, the court shall order and adjudge the property to be sold to satisfy the plaintiff's demands, and if execution issue thereon, the sheriff shall apply the property attached by him,—affords another remedy.

Under that act the property may be sold upon execution issued on the judgment in the main action, and the respondent availed itself of the benefit of the provision as shown by the amended judgment entry of June 9, 1885, adjudging that the property of the defendant taken under the writ of attachment be sold to satisfy said judgment. By that entry the respondent secured every right in the premises it was entitled to. After obtaining a judgment for the sale of the property to satisfy the debt, it was not entitled to a general judgment against the garnishee for the value of the identical property. That would be repugnant to sense and justice. I think the act of October 25, 1878, has superseded the provision in the garnishee proceedings authorizing the entry of judgment against the garnishee, and that the latter proceedings are only affected as a means of discovery. Proceedings of that character being statutory, will not be extended by implication. The remedy given by the later statute in

the particular case referred to, is a complete substitution for that given in the prior one, and, if the two were allowed to stand, would lead to absurdity and injustice, as the proceedings in the case under consideration fully prove. After the respondent obtained a judgment that the property attached be sold to satisfy the debt, the court certainly had no right to render a general judgment against the appellant for the amount of the debt. The two proceedings were for the same purpose, to reach the said property or its value, and apply it to the payment of the debt; and when it had been effectually reached in the action the garnishee proceedings were terminated as completely as they would have been had the defendant Frank come forward on the ninth day of June, 1885, and paid off the judgment against him.

I can see no alternative but that the judgment against the appellant must be reversed. The respondent will still retain its remedy under the judgment against the said defendant. The system under the two statutes is complete under this construction. The garnishee proceedings can be used in such a case as a means of discovery, and when the property attached is fully identified a judgment can be taken in the action against the defendant therein for the amount of the debt, and for a sale of the attached property to satisfy it.

The judgment appealed from is reversed with costs.

LORD, J., concurred.

SUPREME COURT OF WASHINGTON TERRITORY.

PHINNEY *v.* HUBBARD.

Filed August 5, 1885.

FALSE REPRESENTATIONS—EVIDENCE—FINDINGS.—In an action to recover damages for certain false and fraudulent representations made by the defendant, whereby the plaintiff was induced to purchase certain real estate, supposing it to be other real estate, the findings reviewed at length, and held supported by the evidence.

APPEAL from the district court. The opinion states the facts.

R. Osborne and *J. C. Haines*, for the appellant.

T. H. Humes, for the appellee.

WINGARD, A. J. This is an action brought in the court below by the appellee, W. B. Hubbard, against the appellant, G. C. Phinney, to recover damages for certain false and fraudulent representations made by appellant, that induced appellee to purchase certain real estate. The allegations of the complaint in substance are: That on the thirteenth of October, 1882, the plaintiff (appellee in this court), at the request of the defendant (appellant), entered into negotiations to purchase certain lots, described by defendant as lots 10, 11 and 12, block 6, northern addition to the city of Seattle. That the defendant, in order to induce plaintiff to purchase said lots, took

plaintiff upon, showed and pointed out to him lots 4, 5 and 6, North Seattle, and then and there falsely and fraudulently represented that the lots so shown were the lots 10, 11 and 12 which he desired to sell.

That the plaintiff, confiding in said representations and believing the same to be true, purchased the lots described by defendant as lots 10, 11 and 12, northern addition to Seattle, supposing and believing them to be the lots so shown and pointed out to him; and then paid to the defendant the sum of one hundred and fifty dollars, the full purchase price agreed upon. That said lot 10 is worthless and that said lots 11 and 12 do not exist. That said lots 4, 5 and 6, North Seattle (the lots shown) are worth the sum of one thousand five hundred dollars. Alleging damage by reason of such false and fraudulent representations in the sum of one thousand five hundred dollars, and praying judgment therefor.

To this complaint the defendant answers by first denying, specially and generally, all the allegations of the complaint, except the payment of the sum of one hundred and fifty dollars; the defendant then pleads this matter, which he terms a second defense.

Second. "For a second and further defense to plaintiff's said complaint the defendant answers, addressing the same to the Hon. Roger S. Greene, judge of said court. That heretofore, to wit, October 13, 1882, defendant was the owner and had under contract and the control and sale of a large number of lots in the northern addition to the city of Seattle. That plaintiff desired to purchase three lots in said addition and pointed the ones selected by him on the map of said addition. That defendant understood and believed that the lots so selected by plaintiff to be lots 8, 9 and 10 in block 6 in the northern addition to Seattle, but in taking off the description there was a mistake made in the description of said lots so selected, and lots 10, 11 and 12 in the northern addition to Seattle were described and written in the bond for a deed which defendant did on October 13, execute and deliver to plaintiff, and that the plaintiff did pay to defendant the sum of one hundred and fifty dollars. That defendant supposed and believed that he had contracted to convey to the plaintiff the said lots 8, 9 and 10 in block 6, northern addition to Seattle, which lots he then owned, and reserved the same for plaintiff, and had no knowledge of and did not discover the said mistake until the bringing of this action. That the description contained in said bond for deed were lots 10, 11 and 12 in the northern addition to Seattle and not 10, 11 and 12 in block 6 northern addition to Seattle as plaintiff has alleged in his complaint. That there are no lots bearing the description contained in said bond for a deed given by defendant to plaintiff. That defendant practised no fraud upon and made no false or fraudulent representations to plaintiff, but that said erroneous description was the result of inadvertence and mistake. That plaintiff (defendant) has been ready and willing at all times since the discovery of said mistake to pay back to plaintiff the said sum of one hundred and fifty dollars with

interest thereon from the date of payment of the same to defendant (plaintiff). That defendant offered to pay said amount to plaintiff as soon as said mistake was discovered, but that plaintiff (defendant) refused to accept the same. That on March twenty-eighth this defendant tendered and offered to pay to plaintiff the sum of one hundred and ninety dollars in gold coin, but that plaintiff, by his attorney, refused to accept the same; defendant alleges that said sum of one hundred and ninety dollars was sufficient to pay plaintiff the said sum of one hundred and fifty dollars with interest from said October 13, 1882, and all costs to this action to date."

After alleging non-maturing of the bond for deed, and charging that the action was instituted for the purpose of annoying and harrassing defendant and for purposes of extortion, defendant prays that the contract be rescinded, and for costs.

Plaintiff replied to this part of answer denying any *mistake* in the contract of sale, alleging that defendant was "at time of sale, and for a long time prior thereto, engaged in the business of buying and selling real estate in the city of Seattle; that he falsely and fraudulently made the representations charged in plaintiff's complaint, with intent to deceive plaintiff, and that they did deceive him to his damage as alleged."

The case was with the consent of both parties sent to a referee, who reported his findings to the court as follows:

1. On the thirteenth day of October, 1882, the defendant was, and for eight months prior thereto had been, in the real estate and insurance business, having his office and place of business at Seattle, King county, Washington territory.

2. On that day defendant entered into negotiations with plaintiff, for the purchase by plaintiff of certain lots of land situate in the county of King and territory of Washington, described as lots ten (10), eleven (11) and twelve (12) in block six (6), northern addition to the city of Seattle in said county, at defendant's said office, and then and there pointed out to plaintiff said lots of land on Harris' map of Seattle, and to effect said sale to plaintiff, took him out to and showed to him lots 4, 5 and 6 in block 6 of North Seattle, which was then owned by David T. Denny and wife, and then and there knowingly, falsely and fraudulently represented to plaintiff that they were the lots of land which defendant had pointed out to him on the map as lots 10, 11 and 12, block 6, of northern addition to Seattle, and which he wished to sell.

3. That plaintiff and defendant then returned to defendant's office and the plaintiff then and there confiding in said representions of defendant and believing them to be true, agreed to purchase said lots 10, 11 and 12, block 6 of northern addition to Seattle, supposing and believing those lots to be lots which defendant so pointed out and showed to him, and then and there received from said defendant his bond to convey said lots 10, 11 and 12 of the northern addition to Seattle, Washington territory, by good and sufficient conveyance, provided plaintiff should, on or before that day, have

paid to said defendant the sum of one hundred and fifty dollars, gold coin, the price agreed upon; and then and there paid to said defendant said sum of one hundred and fifty dollars, and took his receipt for the same.

In the receipt the lots are described as lots 10, 11, 12, block 6, of northern addition to Seattle, Washington territory. In the bond the word and figures "block 6" are omitted. They refer to one and the same description of land and are parts of one and the same transaction.

4. The said lots 4, 5 and 6 in block 6, North Seattle, were on said October 13, 1882, and are, worth the sum of fifteen hundred dollars in money.

5. The said lot 10, block 6, northern addition to Seattle, was and is worthless, and the said lots described as lots 11 and 12, block 6, northern addition, did not then, and do not, exist.

6. Plaintiff first discovered in December, 1882, that the said lots of land so sold by defendant and described in said bond and in said receipt, were not the lots of land pointed out and shown to plaintiff by defendant at time of sale.

7. Defendant, on March 28, 1883, tendered to T. H. Humes, Esq., attorney for plaintiff, and offered to pay the plaintiff the sum of one hundred and ninety dollars in gold coin which said attorney refused to accept.

Prior to that date, and in December, 1882, defendant stated to plaintiff that if he was not satisfied he would give him his money back and two per cent interest per month, which was not consummated.

8. That defendant, on said thirteenth October, 1882, knew the location of block 6, northern addition, and the number of lots contained therein. That he had in his possession maps showing the different additions to Seattle with their location, excepting said northern addition. That he was informed as to location of lots 4, 5 and 6, block 6, North Seattle, and on said thirteenth October, 1882, knowingly, willfully and fraudulently took plaintiff upon and showed to him said lots 4, 5 and 6, block 6, North Seattle, and then and there knowingly, falsely and fraudulently represented to plaintiff that said lots 4, 5 and 6, block 6, North Seattle, were said lots 10, 11 and 12, block 6, North Seattle, which he desired to sell. That said representations were false to the knowledge of defendant and were made to induce plaintiff to purchase the same, and plaintiff relied upon them as true, and was thereby led to purchase them.

9. That said plaintiff in said transaction was guilty of no negligence or fraud, and the misrepresentations to said lots were not made simply by mistake.

Exceptions were filed to this report and after argument the district court found facts and conclusions of law upon which judgment was entered for the plaintiff below for one thousand, four hundred and fifty dollars.

Defendant below appealed.

After a careful review of all the evidence we think the findings of fact of the referee are fully sustained thereby, except as to the fifth finding. In lieu of said fifth finding we adopt the eighth finding of ths court below as follows: "That the said lot 10, block 6, northern addition to Seattle, was at the times mentioned in complaint, and is worth the sum of fifty dollars. And the said lots 11 and 12, block 6, northern addition to Seattle, did not then, and do not, exist."

Let the judgment of the court below be affirmed.

TURNER, A. J., concurred.

SUPREME COURT OF CALIFORNIA.

No. 8,682.

BROWN, ADMINISTRATRIX, ETC., *v.* CENTRAL PACIFIC R. R. CO.

In Bank. Filed December 5, 1885.

NEGLIGENCE—EMPLOYER AND EMPLOYEE—COMMON BUSINESS—PLEADINGS.—In a complaint to recover for the negligent death of an employee, when the acts and omissions, constituting the negligence, are alleged to have been done or omitted by the defendant itself, as employer, the court cannot presume that they were those of a fellow-employee of the deceased. Consequently the question of the responsibility of a common employer for negligence of another person employed in the same general business cannot arise on demurrer to the complaint.

APPEAL from a judgment of the superior court of the city and county of San Francisco, entered in favor of the defendant. The opinion states the facts. The opinion in department is reported in 6 West Coast Rep., 797.

Henry E. Highton for the appellant.

W. H. L. Barnes, for the respondent.

MYRICK, J. Action to recover damages for negligently causing the death of plaintiff's intestate. The defendant demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was sustained and the plaintiff failing to amend, judgment was rendered for defendant. Plaintiff appealed.

The only question presented, therefore, is as to the sufficiency of plaintiff's case as stated in the complaint.

After alleging that defendant was operating the railroad at the point named, viz., the Oakland wharf, over and upon a narrow strip of land and trestle work, and that it was necessary for some of defendant's locomotives and trains of cars converging at that point, to stop and await the passage of other locomotives and trains, in order to avod accidents by collisions and otherwise, it was alleged that the defendant had devised and prescribed and published a system of signals for the guidance and direction of its engineers (of whom

plaintiff's intestate was one) operating and directing said locomotives and trains, which system the engineers were required by defendant to understand and ordered to obey, and it was a part of the contract of employment that the signals should be correctly given; that it was the duty of the defendant to show and present to view the right signal for the guidance of its engineers; yet that the defendant did not show and present to view the right signal for the guidance and direction of said intestate, acting as engineer; that while said intestate, in his capacity of engineer on a locomotive of defendant, according to directions given to him by defendant, was proceeding over the said place, the defendant did show and present to view the wrong signal for the guidance and direction of said intestate, whereby, without any negligence, unskillfulness or default of the said intestate, but solely and immediately in consequence of the negligence and improper conduct of the defendant, the locomotive was turned aside from the true and safe course and was precipitated into the waters of San Francisco bay, and the intestate was killed; that his death was caused solely by the gross neglect and carelessness of the defendant in giving the wrong signal, namely, the signal to proceed, and in failing to notify him or give him any signal, as it ought to have done, that the switch immediately in front of the locomotive was open, thereby inducing and directing him to proceed with the locomotive.

We have not, in the above statement, given the language in full of the complaint, but have given sufficient, in substance, to present the point of law involved.

In our opinion, the question of the responsibility of a common employer for the acts or negligence of another person employed in the same general business: Section 1,970, civil code; is not here presented. The case as presented in the complaint is of alleged acts and omissions on the part of the defendant itself, as employer: Section 1,969, civil code. Whether the proofs will sustain the allegations is not now for consideration. As against positive allegations that the acts and omissions complained of were by the defendant, we cannot presume that they were those of a fellow-employee of the deceased. The demurrer should have been overruled.

Judgment reversed aed cause remanded, with directions to overrule the demurrer with leave to defendant to answer.

THORNTON, J., MORRISON, C. J., and SHARPSTEIN, J., concurred.

MCKEE, J. DISSENTING: For the reasons given in my opinion heretofore filed in this case: 6 W. C. Rep., 79; 7I think the court below properly sustained the demurrer.

ROSS, J.: I also dissent.

No. 20,255.

EX PARTE BROWN ET AL. ON HABEAS CORPUS.

In Bank. Filed December 7, 1885.

CONVICTION DEFINED—BAIL AFTER VERDICT NOT ALLOWABLE.—The ordinary meaning of the word "conviction" is a finding by the jury of a verdict that the accused is guilty. The word is used in that sense in sections 1,271, *et seq.*, of the penal code. Consequently, under such sections, a defendant, convicted of a felony, in a case not punishable with death or by fine only, is not entitled, as of right, to be admitted to bail, after a verdict of conviction. If bail is allowable at all, in such cases, it must be as a matter of discretion.

APPLICATION for a writ of *habeas corpus*. The opinion states the case.

George W Tyler, for the petitioners.

J. N. E. Wilson, contra.

THORNTON, J. Application for admission to bail by Brown and Weile after the verdict of the jury finding each of them guilty of a felony, and before judgment pronounced on the verdict. The verdict was accepted and recorded by the court.

It is contended that under the law of this state the applicants are entitled to be admitted to bail as a matter of right.

It was held in People v. Tinder, 19 Cal., 539, under the constitution of 1849, that in all other than capital cases and in all capital cases where the guilt is not evident or the presumption great, that a defendant is entitled to bail as a matter of right. The constitution of 1879 has made no change in the law as just above stated. And under the former constitution (and the same is the rule under the present constitution), the guarantee of bail as a matter of right extends only to those cases where the party has not already been convicted: *Ex parte* Voll, 41 Cal., 9.

The statute (see penal code, secs. 1,270, 1,271, 1,272) is in accord with the foregoing. We insert here the text of these sections:

"1,270—A defendant charged with an offense punishable with death cannot be admitted to bail, when the proof of his guilt is evident or the presumption thereof great. The finding of an indictment does not add to the strength of the proof or the presumptions to be drawn therefrom.

"1,271—If the charge is for any other offense, he may be admitted to bail before conviction, as a matter of right.

"1,272—After conviction of an offense not punishable with death, a defendant who has appealed may be admitted to bail—

"1—As a matter of right, when the appeal is from a judgment imposing a fine only.

"2—As a matter of discretion in all other cases."

It is said that there has been no conviction in this case, as judgment has not been pronounced on the verdict.

The question then presented for decision is this—What is a *conviction?* The ordinary meaning of this word is the finding by a jury of a verdict that the accused is guilty. In legal parlance it often signifies the final judgment of the court. The above is said to be

the signification of the word *conviction* in Blaufus v. People, 69 N. Y., 109.

Blackstone says: "If the jury find him (the prisoner) guilty, he is then said to be *convicted* of the crime whereof he stands indicted; which conviction may occur two ways, either by his confessing the offense and pleading guilty, or by his being found so by the verdict of his country:" 4 Black. Com., 262. The same author says: "The plea of *autrefois acquit*, or a former conviction for the same identical crime, though no judgment was ever given or perhaps will be (being suspended by the benefit of clergy or other causes), is a good plea in bar to an indictment:" 4 Black. Com., 336. In 1 Inst., 391, it is said: "The difference between a man attainted and convicted is that a man is said convict before he hath judgment; as if a man be convict by confession, verdict or recreancie, and when he hath his judgment upon the verdict he is said to be attaint." And further it is said by the same writer: "So as by conviction of a felon, his goods and chattels are forfeited, but by attainder, that is by judgment given, his lands and tenements are forfeited and his blood corrupted, and not before." In Jacob's Law Dictionary, 163, it is said: "There is a great difference between a man *convicted* and *attainted*, though they are frequently though inaccurately confounded together;" and in the same work, it is said: "Convict, *convictus*. He that is found guilty of an offense by verdict of a jury. Crompton saith, that conviction is either when a man is outlawed, or appeareth and confesseth or is found guilty by the inquest; and when a statute excludes from clergy persons found guilty of felony, etc., it extends to those who are convicted by confession: Cromp. Just., 9." "Judgment amounts to conviction, though it doth not follow that every one who is convicted is adjudged:" 2 Id., 63, title "Convict and Conviction."

Bishop says: "The word conviction ordinarily signifies the finding of the jury, by verdict, that the prisoner is guilty. When it is said there has been a conviction, or one is convict, the meaning usually is, not that sentence has been pronounced, but only that the verdict has been returned. So a plea of guilty by the defendant constitutes a conviction of him." He then quotes the passage first above given from 1 Inst., and continues: "Yet, the word conviction, when it stands in such a connection with other words as to indicate a secondary or unusual meaning, sometimes denotes the final judgment of the court. Where the proceeding is civil in form, for the recovery of a fine, there cannot be what in law is called a conviction. It has likewise some other significations; according to one of which 'a conviction is defined to be a record of the summary proceedings upon any penal statute, before one or more justices of the peace, or other person duly authorized, in a case where the offender has been convicted and sentenced:'" Bish. on Stat. Crimes, sec. 348. The same writer says: "A conviction in ordinary legal language consists of a plea or verdict of guilty, and it is immaterial whether or not final judgment has been rendered thereon:" 2 Bish.

Cr. Law., sec. 903; 1 Id., sec. 963. See, also, on this point: People v. March, 6 Cal., 543; People v. Goldstein, 32 Cal., 433; Blair's Case, 25 Gratt., 853; Com. v. Williamson, 2 Va. Cas., 211; Shepherd v. The People, 24 How. Pr., 38; Com. v. Lockwood, 109 Mass., 324; State v. Alexander, 76 N. C., 231; Com. v. Richards, 17 Pick., 296; Nason v. Staples, 48 Me., 125; U. S. v. Gilbert, 2 Sum., 40; 2 Hawk., P. C., ch. 36, secs. 1, 10; U. S. v. Watkinds, 6 Fed. Rep., 153; Bouvier's Law Dict., verb "*conviction.*"

The foregoing references show that the ordinary meaning of the word "conviction" is the verdict of guilty pronounced by a jury. As said by Read, J., speaking for the court in The State v. Alexander, *supra:* "The word is ordinarily used to denote the verdict of the jury, guilty. How did the jury find? Guilty; or they convicted him. What did the judge do? Sentenced him to be hanged. This is the language ordinarily used in such matters, both in conversation and in books, law and literary. It is never said that the jury sentenced him nor that the judge convicted him:" 76 N. C., 232.

Now, while the word may be used as signifying the sentence pronounced on the verdict, or the record of conviction including *inter alia* the verdict and sentence, still such meaning ought not to be attributed to it, unless there is something in the context to indicate that it was used in such sense, as in Com. v. Gorham, 99 Mass., 420; Burgess v. Boetafeur, 7 Mann. & Granger, 481, 508.

The words "conviction" and "convicted" are used in the constitution and frequently in the statutes of this state: See const., art. i., sec. 20, and the following sections of the penal code: 681, 689, 1,097, 1,103, 1,104, 1,108, 1,110, 1,111, 1,157, 1,161, 1,162, 1,193, 1,195, 1,197, 1,201, 1,217, 1,218, 1,227, 1,243, 1,271, 1,272, 1,417, 1,418, 1,420.

By the first article, section 20, of the constitution, it is provided: "No person shall be convicted of treason unless on the evidence of two witnesses to the same overt act or on confession in open court."

We think that as it would be proper to instruct the jury on a trial for treason that they could not convict unless upon the testimony of two witnesses to the same overt act, the word "convicted" has reference to the verdict of the jury, and not to the sentence pronounced on the defendant. It also refers to the confession in open court or plea of guilty, prior to the delivery of judgment. There is nothing in the context to show that the word "convicted" is used in any other than its ordinary sense.

These words are used with a like meaning in the greater number of the sections above cited from the penal code.

This, we think, is true of section 689 of the penal code, which is as follows:

"No person can be convicted of a public offense unless by the verdict of a jury, accepted and recorded by the court, or upon a plea of guilty, or upon judgment against him upon a demurrer in the case mentioned in section 1,011, or upon a judgment of a court,

a jury having been waived, in a criminal case not amounting to felony."

Of a statute similar in Virginia it was said, in Blair's case, that it plainly implies that a person may be convicted in either of these modes.

In section 1,161, above cited, we find the expression "verdict of conviction" is used, which clearly implies that a verdict is a conviction.

In section 1,151, *supra*, it is said: "A general verdict upon a plea of not guilty is either guilty or not guilty, which imports a conviction or acquittal of the offense charged in the indictment." It must be the verdict of guilty which *imports* the conviction, and if it imports a conviction, it means or signifies it. In sections 1,217 and 1,218, *supra*, the words conviction and judgment are both used. There can be little doubt here that the former means a verdict of guilty.

It is unncessary to examine particularly all the sections above cited. We are satisfied that *conviction* in the section (1,271) above cited signifies the verdict of guilty pronounced on a trial by the jury.

In view of section 1,166 of same code, we cannot see that any other conclusion than the above can be reached. The section is as follows: "If a general verdict is rendered against the defendant or a special verdict is given, he must be remanded; if in custody, or if on bail, he may be committed to the proper officer of the county to await the judgment of the court upon a verdict. When committed, his bail is exonerated, or if money is deposited instead of bail, it must be refunded to the defendant."

It may be conceded that on a conviction by verdict of a felony, not capital, it is in the discretion of the court to order the defendant, when on bail, into the custody of the proper officer. But when the court does so order him into the custody, he orders him there to be kept by the officer until judgment is pronounced, and if there can be any admission to bail it must be discretionary with the court, and not a matter of right to the defendant.

There is nothing in section 1,272 in conflict with this. According to that section there is one case which is not bailable after conviction—that is, after conviction of an offense punishable with death—one case, where after conviction and appeal taken, bail is allowed as a matter of right, which is the case of an appeal from a judgment imposing a fine only. In all other cases than those above-mentioned, where the defendant has been convicted and has appealed from the judgment, bail is allowed at the discretion of the tribunal granting it.

It may be questioned when reading sections 1,166, 1,271, 1,272, together, and comparing each section with the other, whether bail is allowed in the the class of cases last mentioned in section 1,272, intermediate the verdict and an appeal. If it is allowable at all, it must be as a matter of discretion.

We think it settled law in this state, by the judgments of the court in *Ex parte* Voll, 41 Cal., 29; *Ex parte* Marks, 49 Cal., 680; *Ex parte* Smallman, 54 Cal., 35, and *Ex parte* Marshall, 59 Cal., 386, that this court ought not to admit to bail after a verdict of guilty, unless when circumstances of extraordinary character had intervened since the conviction. No such circumstances are made to appear here.

We add here, in explanation of the foregoing, that there can be conviction in other modes than by the verdict of a jury. Conviction can be by plea of guilty, and in the other modes mentioned in section 689, above cited. But in all these modes, conviction takes place before judgment, except in the last mode mentioned in section 689, and in that it will be observed that a jury is waived, and the trial is by the court, in a case which does not amount to felony. The words "conviction" and "convicted" may signify either of these modes.

From the foregoing, it follows that the defendants should not be admitted to bail, and their application is, therefore, denied, and they are remanded to the custody of the officer. So ordered.

MCKEE, J., ROSS, J., and MORRISON, C. J., concurred.

WEST COAST REPORTER.

WHOLE NO. 104. DECEMBER 24, 1885. VOL. VIII. No. 8.

CIRCUIT COURT, DISTRICT OF COLORADO.

MCEVOY ET AL. *v.* HYMAN.

November 25, 1885.

MINING CLAIMS—LOCATION—CONTEST TO DETERMINE RIGHT OF POSSESSION—DISMISSAL OF—CERTIFICATE OF ENTRY.—Pending an action to determine the right of possession to a mining claim, brought under section 2,326 of the United States revised statutes, the land department of the government has no jurisdiction to determine the matters at issue between the parties. Consequently, a certificate of entry issued to one of such parties, during the pendency of such action, is not conclusive as to the right of possession. And this, although such certificate was issued after the action had been improperly dismissed, if it be subsequently reinstated on the docket.

MOTION for judgment on the pleadings, in an action to determine the right of possession to a mining claim. The opinion states the facts.

C. S. Thomas, for the plaintiffs.

H. M. Teller, for the defendant.

HALLETT, D. J. August 10, 1881, defendant made application in the land office at Leadville to enter and pay for a lode mining claim called Durant, situated in Pitkin county, with a view to obtain title from the general government, in the time and manner specified in sec. 2,325, R. S. Plaintiffs made claim in the land office to a part of the same ground under another location called by them Little Giant. This action of ejectment was brought by them Nov. 7, 1881, in support of their adverse claim, as provided in sec. 2,326, R. S. No trial of the issues joined in the action has occurred, but on the twenty-eighth day of January, 1885, the suit was dismissed by the clerk in vacation under an order from attorneys claiming to represent the plaintiffs. Afterwards, and at the May term, 1885, plaintiffs, or some of them, appeared by other counsel and moved to reinstate the case on the docket, on the ground that it was dismissed without authority from plaintiffs or some of them, or from persons who had acquired title to the property pending the suit. After hearing, that motion was allowed, and the cause now stands for trial on the jury calendar.

In a supplemental answer, filed at this term, defendant alleges that after the order of dismissal mentioned above and before the cause was reinstated on the docket, defendant renewed his application in the land office, and was allowed to enter the claim, and a re-

ceiver's certificate was issued to him. This he asserts was by agreement with certain persons who had acquired title to the Little Giant claim since the suit was brought. Referring to this answer, plaintiffs admitted the entry in the land office, but denied that the persons mentioned in the answer had succeeded to plaintiff's title in the claim.

From the circumstance that other persons not mentioned in the answer, or otherwise appearing of record, have applied to be substituted as plaintiffs in the action in the place of those now appearing, by whom the suit was brought, it may be inferred that the present plaintiffs have conveyed their title, and there is some dispute as to who are entitled to be recognized as grantees.

But that is not material to this inquiry, except as it may tend to show that the controversy exceeds the usual limits touching the validity of mining locations, and involves questions of ownership also.

Upon the fact alleged in the supplemental answer, and admitted by plaintiffs, that entry was made in the land office, and a certificate was issued to defendant for the claim, while the suit stood as dismissed under the clerk's order, defendant now moves for judgment, and the effect of that entry on this suit is the matter for present consideration.

No doubt is entertained as to the general rule on which defendant relies, that in actions at law a certificate of entry, like a patent, is conclusive of the title. As expounded by the supreme court, the rule obtains whenever officers of the land department are invested with judicial authority to decide the facts on which the title to the land in controversy may be obtained, and the patent or certificate of entry affords evidence of such decision. In such cases courts do not undertake to review the decisions of the land department of the government, and they are "conclusive of the legal title in all courts and in all forms of judicial proceedings where this title must control:" Johnson v. Towsley, 13 Wal., 83.

In this case, however, and when considered with reference to the time and circumstances attending its issuance, the certificate of entry, on which defendant relies, cannot be of such weight; because the suit is directed to the very matter which is said to be concluded by the certificate of entry, and the officers of the land department had not jurisdiction of the controversy between the parties. The statute is that, upon filing an adverse claim in the land office, and suit begun in support thereof, all proceedings in respect to the original application shall be stayed "until the controversy shall be settled, or decided by a court of competent jurisdiction, or the adverse claim waived:" Sec. 2,326, R. S.

By this suit the controversy between these parties in respect to these conflicting locations was transferred from the land office to this court, with the necessary result to divest the former tribunal of all jurisdiction until the court, proceeding in its own way and by the recognized methods of the law, shall decide the matters in

issue between the parties. And while the controversy is pending here, it cannot be affected by any action of the land department. If upon some alleged settlement of the controversy and dismissal of the suit, the land department has issued a certificate of entry to defendant, it cannot have the effect to terminate the suit in this court. The court alone will decide when the controversy is at an end and until such decision all things done in the land office must be ignored: Richmond Co. v. Rose, 114 U. S., 576.

The order of dismissal by the clerk is of no importance, since it was set aside and the cause was reinstated on the docket. If that order had been allowed to stand it would have established the rights of the parties no less than the certificate of entry. But it was found to have been improperly entered and the court had ample power to correct the error by setting it aside. When that was done all things depending on it here or in the land office must for the purposes of this suit be regarded as falling with it.

The cause now stands on the docket in its first estate as a controversy relating to the title to the claims to be obtained from the government which is not to be defeated or ended upon any allegation that either party has obtained that title since the commencement of the suit unless by settlement or in some manner which may be recognized in this court.

The motion for judgment on the pleadings will be denied.

PEOPLE, FOR THE USE OF BATES ET AL. v. BOYLAN ET AL.

December 4, 1885.

ATTACHMENT CANNOT BE ISSUED ON ADMINISTRATOR'S BOND—INSTRUMENT FOR DIRECT PAYMENT DEFINED.—An administrator's bond, given under section 152 of the act relating to wills, is not an instrument for the direct payment of money, within the meaning of section 96, subdivision 14, of the code, regulating attachments, and no attachment can be issued in an action founded on such bond. A "direct payment," is one which is absolute and unconditional as to time, amount and the persons by and to whom it is to be made, and a written instrument which provides for such payment is one which expressed those terms fully.

MOTION to dissolve an attachment. The opinion states the facts.

J. N. Baxter and *I. M. Hardinbrook*, for the plaintiffs.

M. B. Carpenter and *H. Riddell*, for the defendants.

HALLETT, D. J. Section 152 of the act relating to wills, Gen. Stat., 1,058, provides that bonds of administrators "may be put in suit and prosecuted against all or any one or more of the obligors named therein, in the name of the people of the state of Colorado, for the use of any person or persons who may have been injured by reason of the neglect or improper conduct of any such executor or administrator as aforesaid, and such bond shall not become void on the recovery thereon, but may be sued upon, from time to time, until the whole penalty shall be recovered."

Pursuant to that section, this action is brought on the bond of Thomas Boylan as administrator of the estate of Martha Boylan, deceased, to recover the sum of one thousand and eighty-nine dollars and thirteen cents alleged to be due from that estate to Levi M. Bates *et al.*

The bond is in the usual form, with condition as follows: "The condition of the above obligation is such, that if the said Thomas Boylan, administrator of all and singular the goods and chattels, rights and credits of Martha Boylan, deceased, do make or cause to be made, a true and perfect inventory of all and singular the goods and chattels, rights and credits of the said deceased, which shall come to the hands, possession or knowledge of him, the said Thomas Boylan as such administrator, or to the hands of any person or persons for him, and the same so made, do exhibit or cause to be exhibited in the county court, in probate, for the said county of Summit agreeably to law, and such goods and chattels, rights and credits, do well and truly administer according to law, and all the rest of the said goods and chattels, rights and credits, which shall be found remaining upon the accounts of the administrator, the same being first examined and allowed by the county court, shall deliver and pay unto such person or persons, respectively, as may be legally entitled thereto, and further do make a just and true account of all his actings and doings therein, when thereunto required by the said court, and if it shall hereafter appear that any last will and testament was made by the deceased, and the same be proved in court, and letters testamentary or of administration be obtained thereon, and the said Thomas Boylan do in such case, on being required thereto, render and deliver up the letters of administration granted to him as aforesaid, and shall, in general, do and perform all other acts which may at any time be required of him by law, then this obligation to be void—otherwise to remain in full force and virtue."

Alleging that the suit was brought on an instrument in writing for the direct payment of money, plaintiffs procured a writ of attachment in aid of the suit under the fourteenth subdivision of section 95 of the code regulating attachments. That clause is that "in all actions brought upon overdue promissory notes, bills of exchange, other written instruments for the direct payment of money, and upon book accounts, the creditor may have a writ of attachment issued upon complying with the provisions of this section." And upon the issue now made, the question is, whether an administrator's bond is a "written instrument for the direct payment of money" within the meaning of the act.

Looking only to the penalty of the bond it certainly is an instrument for the payment of money, but when we come to the condition which is usually regarded as the substantial part, there is no provision for paying any sum to any one. The bond may be a security for the payment of money, as when goods of the estate have come to the hands of the administrator, and money has been obtaind there-

from, and the county court has distributed the fund. But that is in the due administration of the estate for which the bond is a security, and not because of any express provision of the instrument. And certainly the bond is not in any way similar to the instruments mentioned in the statute. In respect to the manner of the payment, promissory notes and bills of exchange are distinguishable from many other contracts, in that they are for a definite sum of money payable absolutely at a specific time.

Upon the principle *noscitur a sociis*, the "other instrument" mentioned in the statute, should be of the class of promissory notes and bills of exchange, in respect to the quality of direct payment. Inasmuch as the word *overdue* in the statute is applicable to the "other instruments," as well as to promissory notes and bills of exchange, such instruments must be of a character to become overdue. And an instrument of that character must be for a fixed sum, payable absolutely at a time specified.

In this feature our statute differs from the statute of California, which gives the writ of attachment "upon a contract, express or implied, for the direct payment of money." In that statute no contracts are mentioned as falling within the description of contracts "for the direct payment of money," and nothing is found as to overdue contracts. It cannot, therefore, be said that decisions of the supreme court of that state upon the statute of that state ought to control here. It is to be observed, also, that in the only case cited from that statute, in which the question was discussed, the views expressed were not altogether satisfactory to the court: Hathaway v. Davis, 33 Cal., 161. And the opinion will hardly be more convincing to the profession than it was to the court.

The word *direct* is of large use in the language, and it has been adopted into the law in many relations. We have direct descent, direct taxes, direct interest, direct route, and so on, until we have come now to direct payment. Any effort to assimilate its meaning, in all the places and connections in which it may be placed, must fail, for obvious reasons. One meaning of the word as given in Webster's dictionary is immediate, express, unambiguous, confessed, absolute. In my judgment, this is clearly the sense in which it is applied to payments. A direct payment is one which is absolute and unconditional as to time, amount and the persons by whom and to whom it is to be made. And a written instrument which provides for such payment is one which expresses those terms fully. It is needless to point out the difference between such an instrument and an administrator's bond.

The attachment will be dissolved and the property seized discharged.

McEVOY ET AL. *v.* HYMAN.

December 7, 1885.

MINING LOCATION—DISCOVERY CUT WITHIN LIMITS OF PRIOR LOCATION.—The fact that a mining location was founded upon a discovery and work done within the limits of a previously located claim, will not vitiate the subsequent location, if the locators of such claim consented thereto, and moved their boundary stakes so as to exclude from their claim the ground where the discovery cut of the subsequent location was made.

THE SAME—BOUNDARIES—STAKES—WEIGHT OF EVIDENCE.—Where the evidence as to whether the boundaries of a mining claim were marked by stakes, is conflicting, affirmative testimony of persons, to the effect that they put such stakes in position, and afterwards saw them in place, is entitled to more weight than the negative testimony of those who say that such stakes could not be found.

THE SAME—MONUMENTS FOLLOWED IN PREFERENCE TO COURSES AND DISTANCES.—In identifying a location, monuments are to be followed in preference to courses and distances when the latter do not agree with the former; and the discovery cut is to be recognized as a monument, so far at least as to include it within the claim.

THE SAME—DEFECTIVE CERTIFICATE MAY BE AMENDED.—A certificate of location, defective in that it contains no reference to natural objects or permanent monuments, may be amended, under section 25 of the general statutes, page 724; the amendment relates to and takes effect from the date of the original certificate.

EJECTMENT. The opinion states the facts.

Patterson & Thomas, for the plaintiff.

H. M. Teller and *Chas. J. Hughes*, for the defendant.

HALLETT, D. J. Ejectment to recover a mining claim called Little Giant, located by plaintiffs on the public lands, in the month of January, 1880. Defendant asserts title to part of the same ground under another location made in the month of October, 1879, and called Durant. As it is the earlier location, the latter must be of superior force if it was regularly made and properly maintained to the time this suit was brought. That the locators of the Durant went upon the ground in August, 1879, and opened the vein in the manner and to the extent prescribed by statute is fully shown.

It seems that the vein crops out in places on the surface of the mountain in a way to show its strike for a long distance. Before August, 1879, two locations had been made on the vein in the lower part of the mountain; of these locations, the one further north was made by the locators of the Durant and called One Thousand and One; following that in a southerly direction was the Spar claim, located by Philip W. Pratt and others. Near the southerly end of the Spar claim, the vein came to the surface and there, with consent of the owners of the Spar, the locators of the Durant made their discovery, opening a cut twelve feet or more in depth. To enable the Durant men to put their discovery in that place the Spar owners gave them permission to move the Spar stakes to the north so as to exclude from the Spar claim the ground where the discovery cut of the Durant was made; and there is evidence to the effect that this was done. Some witnesses, however, testify that the Spar stakes remained in their original position during the following winter and perhaps a longer time. The circumstance that the Spar people did not afterwards make claim to that part of the vein and excluded it from their application for patent sufficiently proves that they had relinquished it to the locators of the Durant; and whether the Spar

stakes were reset in the fall of 1879, is not, under the circumstances disclosed by the evidence, an important fact in determining the rights of parties to this controversy. The Spar location was not then complete; no record had been made of or concerning it, and the change of lines did not encroach on territory previously appropriated by others.

When they first entered on the ground the locators of the Little Giant had actual notice of the Durant location in a way to put them upon inquiry touching its force and validity, and they openly and anxiously sought to find some defect in it. Under these circumstances, if they failed to make full inquiry or too readily accepted the position of the Spar stakes as evidence of invalidity in the Durant claim, they cannot now be heard to say that they were misled to their prejudice. It may be only a question of fact whether the Durant location was founded on a discovery and work done within the limits of the Spar claim; but if it is more, and the plaintiffs could, under some circumstances, say that they were misled by the position of the Spar stakes, it cannot be so here. Inquiry of the Spar owners, the parties chiefly concerned in any attempt of others to take away Spar ground, would have set the plaintiffs right; and the omission to make such inquiry was of their own negligence.

Assuming that the discovery cut of the Durant was by the relinquishment of the Spar owners in ground free and open to occupation, the next question in the order of objections made by plaintiffs is whether that claim was properly marked on the ground. On this point there is a great mass of testimony from both parties; on behalf of defendant to the effect that stakes were properly set as required by the statute of the state: Gen. stat., 723; in the autumn of 1879 when the location was made; that these stakes were seen by disinterested parties in the same year, and after the locators of the Durant had departed from the district; and by other persons in the spring and summer of the year 1880; and the stake at the southeast corner was found when the survey for patent was made in the month of May, 1881. On behalf of plaintiffs, the testimony is, that diligent search was made in the direction in which the claim was supposed to extend, by quite a number of persons at various times during the year 1880, and no stakes could be found.

In this conflict of testimony it is only necessary to say that the weight is with the defendant. Assuming that all the witnesses were equally worthy of credit those who testify affirmatively that they put the stakes in position, or that they saw them in place, must be taken to have better knowledge of the subject than those who say that the stakes could not be found. It appears that some of the witnesses who were unable to find stakes, examined the ground in winter when the snow must have obstructed the view, and the circumstances attending the inspection of others may not have been favorable to a correct result. Upon the evidence, I conclude that the boundary stakes of the Durant were properly set when the location was made.

As the Little Giant was located in January following, no question is presented as to diligence on the part of the locators of the Durant in keeping the stakes in position; whatever the duty of a locator of a mining claim as to maintaining his stakes, having set them up in the autumn he cannot be expected to renew them in January following.

In the course of testimony at the trial, a question was made whether the notice posted at the discovery cut of the Durant gave the direction of the vein; but it was conceded in argument that the statute did not require it. The notice at all times maintaind at the discovery cut, seems to have been full and complete under the statute, and no point is now made against it. The chief objection to the Durant location is founded on the original certificate which was filed for record in the proper office November 20, 1879. This, it will be observed, was before any step was taken towards the location of the Little Giant, and the objection is not as to the time it was made or filed for record.

But it is said that the ground now claimed as the Durant location is not described in it, and it contains no reference to a natural object or permanent monument as required by section 2,324 of the statutes of the United States. The description in the certificate is as follows: "Beginning at corner No. 1 southwest; thence east sixty-three degrees south three hundred feet to stake No. 2; thence north twenty-seven degrees east seven hundred and fifty feet to stake No. 3; thence in the same course seven hundred and fifty feet to stake No. 4; thence west sixty-three degrees north three hundred feet to stake No. 5; thence south twenty-seven degrees west seven hundred and fifty feet to stake No. 6; thence in the same course seven hundred and fifty feet to the place of beginning. Said lode situated on Aspen mountain—discovered August 13, 1879. Work done by open cut twelve foot face."

Beginning at the southwest corner as it was actually located in the survey for patent, and following the description as given in the certificate, the claim assumes a rhomboidal shape, extending somewhat south and west of the survey as made, and embracing little more than one-half of the territory covered by the patent survey. It excludes the southeast corner stake and the discovery cut. To avoid this result, the surveyor who made the patent survey read the first course in the certificate, which is the south end line of the claim as south sixty-three degrees east, instead of east sixty-three degrees south as written; and the third course which is the north end line of the claim as north sixty-three degrees west, instead of west sixty-three degrees north as written. So understood, the courses are approximately correct, but it is still necessary to allow something like four degrees in all the courses for the inaccuracies sure to occur in the rude efforts of miners to give courses and distances.

In the amended survey the first course is south fifty-eight degrees fifty-two minutes east, the second course is north thirty-one degrees eight minutes east, and so on. In support of his interpretation of the

description in the certificate, the surveyor says that the intention of the locators to make the claim rectangular in shape is clearly apparent, and he was governed by the only monuments that could be found—the south-east corner stake and the discovery cut. The reason last stated appears to be sufficient, for monuments are to be followed in preference to courses and distances, when the latter do not agree with the former: Pollard v. Shively, 5 Col., 309. And, I think, the discovery cut is to be recognized as a monument, so far, at least, as to include it within the claim. When the point of discovery is marked as required by statute, to exclude it from the claim would be most extraordinary. For, as the discovery is essential to a valid location, it must be presumed that the locators intend to secure that point in preference to all other parts of the claim. The lines, as drawn by plaintiffs from the certificate above, exclude the only ascertainable monuments, and that is sufficient ground for rejecting them and sustaining the patent survey.

So understood, however, the certificate is still defective, for, as we have seen, the courses and distances were not correctly given, and it contains no reference to a natural object or permanent monument as required by section 2,324 of the revised statutes of the United States. By one section of the statute of the state a certificate so defective is declared to be void, but another and subsequent section gives the locator or owner of a claim the right to amend such defects: Gen. stat., sec. 16, p. 722, and sec. 25, p. 724; see also this statute as first enacted by territorial assembly, tenth sess., 186.

The section relating to amendments, is as follows: "If at any time the locator of any mining claim heretofore or hereafter located, or his assigns, shall apprehend that his original certificate was defective, erroneous, or that the requirements of the law had not been complied with before filing, or shall be desirous of changing his surface boundaries, or of taking in any part of an over-lapping claim which has been abandoned, or in case the original certificate was made prior to the passage of this law, and he shall be desirous of securing the benefits of this act, such locator, or his assigns, may file an additional certificate, subject to the provisions of this act; *provided*, that such relocation does not interfere with the existing rights of others at the time of such relocation, and no such relocation or other record thereof shall preclude the claimant or claimants from proving any such title or titles as he or they may have held under previous location."

It will be observed that the section provides for correcting errors and defects in a certificate of location, as well as for changing the boundaries so as to take in territory not before embraced in the claim. Doubts have arisen as to whether the proviso in relation to existing rights is applicable to the clause which refers to errors and defects in the certificate. The better opinion appears to be that the proviso relates only to the matter of taking into the claim new territory. Apparently that was the matter to which the attention of the legislative assembly was chiefly directed. It is, perhaps, unfortu-

nate that the question of amending a certificate and of changing the boundaries of a claim, which amounts to a relocation, should be expressed in general terms, relating to both subjects, and in one section of the law. But the confusion resulting from such an attempt should not obscure the purposes of the law. Errors and mistakes in certificates of location are of frequent occurrence.

Under the law as it is at present, a full, complete and unimpeachable certificate cannot be made without the aid of a surveyor and the best instruments. And with such aids the surveyors often disagree, and time and labor are required to decide between them. Of course, it is often, and, perhaps, generally, impracticable to obtain the services of a surveyor in making a location, and the miner must depend on his own skill and judgment. In such effort he usually fails; indeed, it may be said that, as to the course of his lines, he is always in error. And the natural object and permanent monument required by section 2,324 of the revised statutes are entirely beyond his grasp. He does not know what they are or how to refer to them. Every one who is at all familiar with mining locations knows that in practice the first record must usually, if not always, be imperfect.

Recognizing these difficulties, it has never been the policy of the law to avoid a location for defects in the record; but rather to give the locator an apportunity to correct his record whenever defects may be found in it. Such seems to be the meaning of the first clause of the section quoted above. If, at any time, a certificate shall be found defective or erroneous, it may be amended. And section 16 of the same act, which declares that defective certificates shall be void, when read in connection with this section, and qualified by it, will be understood as saying that defective certificates are lacking in force and sufficiency until amended, as provided in sec. 25, but not wholly void. A void thing is null and not subject to amendment. A thing *in esse* is a condition precedent to the exercise of the power of amendment, for a living graft cannot be put on a dead stock, and, therefore, it is not correct to say that an imperfect certificate is void. When amended it has full life, and the amendment takes effect with the original as of the date of the latter. This is the function and proper office of an amendment; to put the original in perfect condition as if it had been complete in the first instance.

The case of Stepy v. Stark, 7 Col., 614; 4 West Coast Rep., 663, seems to support these views. The facts were different in that case, but the right of a locator to amend his certificate was recognized. After the original certificate of the Durant location was amended that certificate and the amendment were properly received in evidence as constituting a perfect certificate having effect from the date of the original and no objection to the record of that claim is found. In this view the Durant title is superior to the other and must prevail.

The other questions in the case may be passed without discussion.

The judgment will be for the defendant.

SUPREME COURT OF NEVADA.

ESTATE OF MCMAHON, DECEASED.

Filed December 14, 1885.

ESTATE OF DECEASED—EXECUTOR CANNOT BE COMPELLED TO PAY MONEY TO COUNTY TREASURER.—Upon the settlement of the final account of an executor, the court has no power to order him to pay the money in his hands, to the county treasurer.

APPEAL from an order of the sixth judicial district court, Lincoln county, requiring the executor of said estate to pay certain moneys into the county treasury.

T. Coffin, for the appellant.

HAWLEY, J. The executor of this estate presented to the district court an "account of his receipts and disbursements as a final account of his executorship," and on the day set for this settlement of the account the report of the executor was confirmed, and the account "allowed and approved" by the court. The portion of the order appealed from, reads as follows: "The said executor is hereby ordered to forthwith pay into the hands of the county treasurer of Lincoln county, state of Nevada, the above mentioned sum of one thousand and eighty-seven dollars and fifty cents, said sum to be by said treasurer placed to the credit of the heirs and devisees of said Anthony McMahon, deceased, and to be by said treasurer paid to said heirs or devisees upon the order of this court after proof of identity as such." The sum of one thousand and eighty-seven dollars and fifty cents was the amount shown to be in the hands of the executor.

If the estate was not in a condition to be closed when the final account of the executor was presented, it was the duty of the court to give such reasonable extension of the time as might be necessary "for a final settlement of the estate:" 1 Comp. L., 729.

The order requiring the executor to pay the moneys in his hands to the county treasurer, was without authority of law and void: Wilson v. Hernandez, 5 Cal., 443. The costs of this appeal should be paid "out of the estate:" 1 Comp. L., 791.

The order appealed from is reversed and the cause remanded.

SUPREME COURT OF OREGON.

STATE *v.* LOUEY ET AL.

March Term, 1884.

RIOT—INDICTMENT SPECIFYING OTHER CRIME—SURPLUSAGE.—Statements in an indictment for riot, which show that the crime of robbery was also committed, will be regarded as surplusage, when it appears that there was no intention to indict for that crime, and the indictment is otherwise sufficient, under section 639 of the criminal statutes.

THE SAME—ALLEGATION OF INDICTMENT.—In such indictment it is sufficient to allege that the defendants "did encourage the other persons participating" in the said riot "to acts of violence and force."

APPEAL from Baker county. The opinion states the facts.

L. L. McArthur, for the appellants.

J. A. Stratton, for the respondent.

BY THE COURT. The indictment in this case clearly charges the crime of riot under the first sentence of section 639 of our criminal statutes: See Bish. Crim. Pr., sec. 992. The details entered into in the indictment which go to show that the crime of robbery was also committed, when it is not the intent to indict for that crime, are but surplusage. The instructions referred to on page five of the appellants' brief were grounded on the subsequent provisions of section 639, which were not involved in the case before the court, and consequently were correctly refused. It is sufficient for the indictment to allege that the defendants "did encourage the other persons participating" in the said riot "to acts of violence and force:" 2 Bish. Crim. Pr., secs. 74, 75, 200. The verdict follows the indictment in this last particular, and also finds the defendants guilty of riot generally, which implies a conviction of the crime of riot charged in the indictment: Crim. St., sec. 179.

Judgment affirmed.

TAYLOR *v.* TAYLOR.

March Term, 1884.

DIVORCE, WHEN GRANTED—CRUELTY.—A divorce will not be granted on the ground of cruelty, unless the proof be clear and satisfactory of the truth of the charge preferred.

THE SAME—PROVOCATION BY WIFE.—The cruel treatment which lays the foundation for a divorce, must be unmerited and unprovoked. And when the wife is ill-treated on account of her own misconduct, her remedy is a reform of her own manners, unless the return from the husband is wholly unjustified by the provocation, and quite out of proportion to the offense.

APPEAL from Multnomah county. The opinion states the facts.

John Catlin and *Northrup & Gilbert*, for the appellant.

A. H. Tanner and *J. C. Moreland*, for the respondent.

LORD, J. This is a suit for a divorce in which the plaintiff obtained a decree in the court below on the ground of cruelty. The evidence in the case is quite voluminous, and we have concluded that no use-

ful purpose will be subserved by reviewing it. We have examined it patiently and carefully, and the conclusion reached is in conflict with the decree rendered. While it may be conceded that the defendant has not at all time acted towards his wife with consideration, forbearance, and affection, yet it must be admitted that she has been quite, if not equally, as remiss, and that much of the ill-treatment of which she complains was provoked by her own conduct. In Skinner v. Skinner, 5 Wis., 451, the court says:

"It is well settled that the cruelty which lays a just and legal foundation for a divorce must be unmerited and unprovoked. And when the wife is ill-treated on account of her own misconduct, her remedy is a reform of her own manners, unless the return from the husband is wholly unjustified by the provocation, and quite out of proportion to the offense:" Bish. Mar. & Div., sec. 764.

In regard to the acts of cruelty complained of, the testimony of the plaintiff is in direct conflict with the defendant, and is contradicted by the children in every instance where the acts are alleged to have occurred in their presence. The policy of the law is to uphold and sustain the marriage relation, and courts of equity will not lend their aid to dissolve it, unless the proof be clear and satisfactory of the truth of the charge preferred.

As a result, the decree must be reversed and the bill dismissed.

WATTIER v. MILLER.

March Term, 1884.

EASEMENT TO OVERFLOW LAND—OWNERSHIP OF SOIL.—An owner of land has no right, as such, to turn back a river upon the land of a proprietor above him.

THE SAME—PRESCRIPTION—U. S. LAND.—A right to overflow the lands of the United States, or of the state, cannot be acquired by prescription.

THE SAME—POSSESSION—OCCUPANCY.—The right of possession of one in the actual occupation of land, over which an easement is claimed, cannot be questioned by one who shows no greater rights in himself.

THE SAME—CERTIFICATE OF SALE—RIGHT OF POSSESSION.—A certificate of sale to swamp land conveys a present interest, with a right to the possession, liable to be defeated upon the failure to perform subsequent conditions.

APPEAL from Marion county. The opinion states the facts.

N. B. Knight and *W. W. Thayer*, for the appellant.

Geo. H. Williams, for the respondent.

WALDO, J. The water rights of Wattier are such as accrue to him as owner of the soil on which his mill stands, or such as he has acquired by grant, or license, or by prescription. As the owner of the soil, Wattier has no right to turn the water of Little Pudding river back upon the land of a proprietor above him: Stout v. McAdams, 2 Scam., 67; Ripka v. Sergeant, 7 Watts & S., 9. But Wattier cannot, under the evidence in the case, claim any water rights except such as belong to him as the owner of the soil on which his mill stands. He sets up no grant or license to overflow the lands above

them. He can acquire no right by prescription to overflow the lands of the United States, or of the state: Vansickle v. Haines, 8 Nev., 164. And he failed to make out any such right against any private owner.

The appellant is cutting his ditch on land of which he is in actual possession. Wattier is not in possession, and shows no right to the possession. In such case, the authorities show that the appellant's right to the possession cannot be inquired into; for if the respondent can show title to be in the United States, or in the state, why cannot he show it to be in some third person? If Miller had brought an action on the case against Wattier for overflowing the land to which the former is asserting title, Wattier could not have defended by questioning Miller's title: Hendrick v. Johnson, 5 Port., 208. So, when Wattier attempts to prevent Miller's making such use of the land as is naturally incident to its ownership, he cannot set up that Miller is not the owner, but that the land belongs to B. & C. Miller's possession and positive assertion of ownership is good against one who can show no better title. Before he can make out his right to an injunction, Wattier must show that he himself has rights there, and this he has utterly failed to do: Weiss v. Jackson Co., 9 Or., 471; Griffin v. Bartlett, 55 N. H., 119, 127.

The only right the appellant claims is the right to drain off surface-water standing on his own land and such water as may have been turned back upon it by respondent's dam. So far as the respondent attempts to prevent this, he is attempting to assert an easement in another man's land, for which he has never paid a dollar, and to which he asserts no manner of title, except actual user, which has not ripened into a right by prescription. The respondent has the burden of proof upon him, and has failed to make out any right to the relief which he claims. Wattier can no more question Miller's title than Miller can question Wattier's. Miller's possession is a good title against Wattier.

It also appears that Miller has paid his twenty per cent, and has a certificate of sale from the state to this land as swamp land. This certificate conveys a present interest, for the act declares that on failure to perform subsequent conditions the land shall revert to the state. A right to the possession follows this certificate, for the object of the act is to reclaim the swamp land, and to do this possession is necessary. Whether this right to the possession has terminated or not is a question of law, which Wattier cannot inquire into. He is not in a position to compel swamp land claimants to put their rights in issue.

It follows that the decree pronounced by the court below must be modified in accordance with this opinion.

WATSON, C. J., dissenting.

GILL ET AL. v. FRANK.

Filed November 23, 1885.

ATTACHING CREDITORS—BONA FIDE PURCHASERS—CHANGE OF POSSESSION ON SALE.—As against third persons an attaching creditor is to be regarded as a purchaser in good faith and for a valuable consideration, and in order to defeat his rights, by a prior sale of the property attached, there must be such a change of possession or delivery of the goods as passes the property.

THE SAME—WAREHOUSEMAN'S RECEIPT—ASSIGNMENT OF—CONSTRUCTIVE DELIVERY.—When the terms of a warehouse receipt are such that the warehouseman offers or undertakes to deliver the property to whomsoever the receipt may be indorsed, a symbolical delivery may be effected by its assignment or delivery, and he becomes bailee to such assignee, in accordance with the terms of his contract. In such case a delivery of the receipt is a symbolical delivery of the property itself. But when the receipt restricts the promise to deliver to the bailor personally, and not to his order, a change in the possession of the property bailed cannot be effected by a mere assignment of the receipt, without the consent of the bailee thereto, so as to defeat the rights of subsequent attaching creditors of the bailor.

APPEAL from the circuit court. The opinion states the facts.

Alfred F. Sears and *Raleigh Stott*, for the appellant.

M. G. Manly and *E. B. Watson*, for the respondents.

LORD, J. This is an appeal from a judgment in favor of the plaintiffs by M. Koshland, the garnishee. The bill of exceptions shows that at the trial the plaintiffs introduced testimony tending to prove that the garnishee had property in his possession, belonging to the judgment debtor, at the time of the garnishment, of the value of one thousand four hundred dollars, and rested. The garnishee then introduced A. Burnheim as a witness in his behalf, who testified that he was the garnishee's agent and manager at his warehouse when the garnishment was made; that he received the property in litigation from the judgment debtor, and gave a warehouse receipt therefor, which was afterwards returned to him, but that it was not returned to him by Frank to whom it was issued, or by Gross to whom, by an indorsement on the back it purported to be assigned. The garnishee offered the warehouse receipt with the assignment indorsed thereon in evidence. The plaintiffs objected on the ground and to the effect, that the receipt and the indorsement, purporting to be an assignment thereof, showed no delivery to Gross, which the court sustained. The correctness of this ruling is the only ground of alleged error it is necessary for us to consider.

The contention of the appellant is that a transfer of a warehouse receipt operates as a transfer of the property in the hands of a warehouseman, and the delivery of the receipt is the delivery of the goods, and consequently, that the receipt and indorsement was evidence of the fact that Frank was not the owner of the goods. Before applying the principles of law which, we conceive, are applicable to the case, it is well to note the facts to which they are to be applied. The warehouse receipt given by the garnishee and bailee to Frank, and purporting by its indorsement thereon to have been assigned by Frank to Gross, was a plain undertaking to deliver to Frank, his bailor personally, the parcels of goods therein enumerated, upon the payment of certain charges, etc. It is without the

words "or order," or any other form of words which may be construed into an agreement or offer of the garnishee to hold the goods entrusted to his care for any one else. The evidence of the managing agent of the garnishee further shows that the receipt with its indorsement somehow come back into his possession, but how and in what way he does not know, except that he is certain it was not returned to him either by Frank or Gross, to whom it purported to be assigned. In the light of all the facts, the inference is very strong, that there never was any delivery of the assignment to Gross. Howsoever the return of the receipt may have been effected, the probabilities are it was for the purpose of having the transfer of the property accomplished through a new warehouse receipt. If this be true, it shows that the parties did not expect, or understand any change in the possession of the property would take place by force of the assignment without the consent of the bailee. Nor is there any other construction which can be given to the facts as disclosed, that would be consistent with the contract of bailment without subjecting the appellant to unfavorable criticism.

It must be noted as against third persons, an attaching creditor is to be regarded as a purchaser in good faith and for a valuable consideration, and in order to defeat his right in the premises, there must be such a change of possession or delivery of the goods as passes the property. When the terms of the receipt are such that the warehouseman offers or undertakes to deliver the property to whomsoever that receipt may be indorsed, a symbolical delivery may be effected by its assignment or delivery, and he becomes bailee to such assignee in accordance with the terms of his contract. In such case, a delivery of the receipt is a symbolical delivery of the property itself. But when a warehouseman accepts the custody of property, and by his receipt as bailee, restricts his promise or undertaking to deliver the property to his bailor personally, and upon the condition of the payment of charges, etc., a change in the possession of such property cannot be effected, so that his custody should become the possession of a stranger, without his consent or the violation of his agreement. He has got the possession of the goods and his assent is necessary to effectuate a change in such possession whether the receipt is assigned or not. When it is proposed, therefore, to give an assignment the effect of a delivery of the goods as against an attaching creditor, the receipt of its assignment, taken together, ought to be broad enough at least, to authorize such a construction.

It may not be amiss to observe that there is an important distinction between this case and Solomon v. Bushnell, 11 Or., 277; 2 West Coast Rep., 818. There the wheat receipt was in a form to authorize the construction given to it upon well settled principles of law. It contained an express promise or undertaking of the warehouseman to his bailor "to deliver to his order," with usual conditions as to damages by fire and charges for storage. There was, therefore, no difficulty in constructing its terms, when indorsed and

delivered, as a symbolical delivery of the property itself, and consistently, with commercial usage as applied to other documents not negotiable in the technical sense.

In Hallegarten v. Oldham, 135 Mass., 1, Holmes, J., ably examines this subject, and, although the rule adopted in that state, as to delivery, where applied to an attaching creditor is, probably, more strict than here, the principles of law which he applies to receipts of the character under consideration is peculiarly in point. He said: "The question is, then, how the transfer of any document can have that effect. The goods are in the hands of a middleman, and they remain there. A true change of possession could only be brought to pass by his becoming the servant of the purchaser for the purpose of holding the goods, so that his custody should become the possession of the master. But this is not what happens, and it has been held that less would satisfy the law. A carrier or warehouseman in this case, is not the servant of either party *quoad* the possession, but a bailee holding in his own name, and asserting a lien for his charges against all parties. He has possession of the goods, whether the document is transferred or not. But it has been held that the principle of the rule requiring a delivery is satisfied although the letter of it is not, if the possessor of the goods becomes the purchaser's bailor: Tuxworth v. Moore, 9 Pick., 347; Russell v. O'Brien, 127 Mass., 349, 354; Dempsey v. Gardner, 127 Mass., 383. Now it is obvious that a custodian cannot become the servant of another in respect of his custody except by his own agreement. And *a fortiori* when that custodian does not yield, but maintains his own possession, it is clear that his custody cannot enure to the benefit of another, as if it were the possession of that other, unless the bailee consents to hold for him subject to his own rights. The only way, therefore, in which a document can be a symbol of goods in a bailee's hands, for the purpose of delivery to a purchaser, is by showing his consent to become the purchaser's bailee. It may or may not be to him, that if a warehouse receipt contains an undertaking to deliver to order, that undertaking is to be regarded as an offer by the warehouseman to any who will take the receipt on the faith of it, and that it will make him warehouseman for the indorsee, without more, on ordinary principles of contract. That is the argument of Benjamin on Sales, 676, *et seq.*, criticising Farmer v. Home, 16 M. & W., 119, and Blackburn on Sales, 297. But the criticism and case agree in the assumption that the only way in which an indorsement of a document of title can have the effect of a delivery, is by making the custodian bailee for the holder of the document and that he cannot be made so, otherwise than by his consent. The necessity for notice, in those cases where notice is necessary, stands on the same ground. If the custodian has not assented in advance, he must assent subsequently; and the principle is the same whether an express acceptance of a delivery order be required, or it is held sufficient if he does not dissent when notified: Boardman v. Spooner,

13 Allen, 353, 357; Carter v. Willard, 19 Pick., 1, 3; Bentall v. Burn, 3 B. & C., 423. * * * When a private warehouseman, who has an unfettered right to choose the person for whom he will hold, gives a receipt containing only an undertaking to his bailor personally, without the words 'or order,' or any other form of offer or assent to hold for any one else, it is impossible to say that a mere indorsement over of that receipt will make him bailee for a stranger. He has not consented to become so, even under the principles argued for by Mr. Benjamin. And until he has consented to hold for some one else he remains the bailee or the party who intrusted him with the goods."

In the case at hand the court was called upon to say whether the instrument as indorsed brought about a constructive delivery of the property. The evidence which preceded failed to show any delivery of the receipt as indorsed to Gross, or to account for its possession in the hands of the bailee, except in a way which strengthened the assumption there was no delivery of it to Gross, and in the absence of anything to show the assent of the custodian of the property to hold it for any other, the legal construction of its terms, as regulated by well settled rules of law, necessarily excluded its introduction in proof of the fact of delivery. It was, therefore, inadmissible to show a symbolical delivery as against an attaching creditor.

As this action was commenced and the rights under it accrued prior to the recent act of the legislature making warehouse receipts negotiable it has no application to the case.

The judgment is affirmed.

SUPREME COURT OF CALIFORNIA.

No. 9,099.

PETERSON v. DOE ET AL.

Department Two. Filed December 12, 1885.

EVIDENCE—FINDINGS.—Where the evidence is conflicting, the judgment will not be reversed on the ground that the findings are not supported by the evidence.

APPEAL from a judgment of the superior court of the city and county of San Francisco, entered in favor of the plaintiff, and from an order denying the defendants a new trial. The opinion states the facts.

Pillsbury & Titus, for the appellant.

Danl. T. Sullivan, for the respondent.

MORRISON, C. J. This action was brought for the recovery of one thousand and forty dollars and ten cents for the wrongful conversion by defendant of certain railroad ties, the property of the plaintiff.

The case was tried by the court without the intervention of a jury, and the following are the findings of fact and conclusions of law, upon which judgment was rendered for the plaintiff.

"I. That the defendants L. B. Doe, George H. Kimball and Charles W. Mott, were, at all the times mentioned in the complaint, and still are, copartners, doing business in the city and county of San Francisco, state of California, under the firm name and style of Doe, Kimball & Co.

"II. That on the fourth day of July, 1882, at the said city and county of San Francisco, the plaintiff here was possessed as of his own property, of said personal property, viz.: two thousand and seventy pieces of timber, called railroad ties.

"III. That said railroad ties were of the value of eight hundred and ninety dollars and ten cents, lawful money of the United States, on said fourth day of July.

"IV. That while plaintiff was so possessed of said property on said fourth day of July, 1882, the said defendants took, seized and carried away and converted the same to their own use without the permission or consent, and against the will of plaintiff.

"Wherefore, as conclusions of law from the foregoing findings of facts, the court finds that the plaintiff is entitled to a judgment against the defendants herein for the sum of eight hundred and ninety dollars and ten cents, together with interest thereon from the first day of January, 1883, at the rate of seven per cent per annum, amounting" etc.

A motion was made for a new trial which was denied and the appeal is from both judgment and order.

There is no seriously contested question of law in the case, but the contention is that some of the findings are not supported by the evidence. A careful examination of the transcript in the case fails

to support the contention of the appellants. We think there was sufficient evidence to justify the findings and on such findings the judgment properly passed for plaintiff. It is sufficient to say that upon the main points in the case there was a substantial conflict in the evidence, and in such cases it is the well settled rule that this court will not interfere with the judgment.

Judgment and order affirmed.

MYRICK, J., and THORNTON, J., concurred.

No. 11,021.

GOLDEN STATE AND MINERS IRON WORKS *v.* MUIR.

In Bank. Filed December 16, 1885.

FINDINGS—WANT OF CONSIDERATION.—Finding that the instrument sued on was without consideration held not supported by the evidence.

APPEAL from a judgment of the superior court of Placer county, entered in favor of the defendant, and from an order denying the plaintiff a new trial. The opinion states the facts.

Gray & Haven, for the appellant.

R. Percy Wright, for the respondent.

MYRICK, J. The defendant executed to plaintiff an order in the following words:

"$3,628.66. MICHIGAN BLUFF, March 7, 1883.

"On June 15, 1883, for value received, please pay Golden State and Miners' Iron Works, or order, at the banking house of Wells, Fargo & Co., San Francisco, Cal., thirty-six hundred and twenty-eight 66-100 dollars.

"(Signed.) WM. MUIR.

"To the Weske Consolidated Mining Co., San Francisco, Cal."

The order was presented and not paid, of which defendant had due notice. The first cause of action is on this order. The second cause of action is for goods and machinery sold and delivered by plaintiff to defendant. The defendant executed to plaintiff a mortgage of personal property to secure the payment of the order, and of the amount of the goods and machinery. This action is to foreclose the mortgage.

The answer averred that there never had been any consideration for the instrument above quoted of March 7, 1883, and denied that plaintiff sold and delivered to defendant the goods or machinery, or any part thereof; also averred there was no consideration for the mortgage. The findings of court were that on the seventh of March, 1883, or at any time before that day, defendant was not indebted to plaintiff in any sum; that plaintiff did not sell or deliver the goods or machinery, or any part thereof, mentioned in the complaint, and defendant was not indebted to plaintiff therefor in any sum, and

that there was no consideration for the mortgage. Judgment went for defendant.

The appellant urges that the findings are not sufficient as findings of fact, but are conclusions of law merely, and are, therefore, not sufficient to sustain the judgment. Without determining this question, we are of opinion that the findings, even if sufficient as findings of fact, are contrary to the evidence. The uncontradicted evidence of the witnesses on the part of the respondent, instead of overcoming the presumption of a consideration afforded by the written instrument, showed a sufficient consideration in all respects as foundation for findings in favor of plaintiff as to that instrument, and also tended to show a sale of the goods and machinery.

The judgment and order are reversed and cause remanded for a new trial.

ROSS, J., SHARSTEIN, J., MORRISON, C. J., and THORNTON, J., concurred.

No. 9,113.

SCHIEFFERLY v. TAPIA.

Department Two. Filed December 16, 1885.

NEW TRIAL—NOTICE OF INTENTION—TIME FOR FILING—WAIVER.—An objection that a notice of intention to move for a new trial was not served and filed in time is waived if there is nothing in the statement to show that the adverse party made any objection to the service of the notice on admitting service of it, or of the statement, or on settlement of the statement.

LIEU LANDS—PRE-EMPTION—PATENT FROM STATE—ATTACKING VALIDITY OF.—The land in controversy was listed to the state as lieu on March 13, 1877, on an application and selection made by it on October 1, 1873. On July 31, 1879, the patent of the state was issued to plaintiff's grantor. The defendant claimed under a pre-emption settlement made in November, 1870, prior to the inception of any rights on the part of the state. *Held*, that the defendant could not attack the validity of the listing to the state, without connecting himself with the United States, the original source of title. To do this, under his claim of pre-emption, he must show that he was at the time of the selection made by the state, in privity with the United States. To establish this privity he must show that he was a duly qualified pre-emptor according to law and had fully complied with the laws of the United States at the time existing requisite to acquire the right of pre-emption. Neither could he attack the patent by the state without showing some privity with the state.

THE SAME—TIME FOR FILING DECLARATORY STATEMENT—PRIORITIES.—The survey of the township, containing the land in controversy, was filed in the proper district land office on June 13, 1872. The defendant filed his declaratory statement on December 20, 1873. *Held*, under the statute of the United States requiring the pre-emption right claimant to file his declaratory statement within three months from the date of the receipt at the district land office of the approved plat of the township, embracing his pre-emption settlement, that defendant's declaratory statement was not filed in time; that the claim of the state was, therefore, prior in point of time, and by reason of such priority its title derived by the listing in 1877 was superior in right.

EJECTMENT—EQUITABLE ISSUES MUST BE FIRST TRIED.—In an action of ejectment equitable issues raised by the answer should be first tried.

APPEAL from a judgment of the superior court of San Luis Obispo county, entered in favor of the defendant, and from an order denying the plaintiff a new trial. The opinion states the facts.

F. Anderson, V. A. Gregg, J. M. Wilcoxson, Jas. F. Stuart and *H. A. Powell*, for the appellant.

E. & Wm. Graves and *J. N. Turner*, for the respondent.

THORNTON, J. The appeal from the judgment was not taken in time, and must, therefore, be dismissed.

It is said that the notice of intention to move for a new trial was not served and filed in time. The record shows that due service of the statement on motion for a new trial was admitted by the defendant's attorney, and that this statement was allowed and settled by the judge, "both parties being present by their attorneys." There is nothing in the statement to show that defendant's attorney made any objection to the service of the notice of intention on admitting service of it, or of the statement, or on the settlement of the statement, and under such circumstances it must be held that any fault in giving notice was waived. See Hobbs v. Duff, 43 Cal., 486; Gray v. Nunan, 63 Cal., 220; Hibernia Soc. v. Moore, 8 West Coast Rep., 319.

The motion to dismiss the appeal from the order denying a motion for a new trial must therefore be denied.

The action is ejectment. The land in controversy was listed to the state of California as lieu on the thirteenth of March, 1877, on an application and selection appearing to have been made by it on October 1, 1873. On the thirty-first of July, 1879, the patent of the state was issued to Willard B. Brown, and on the seventeenth of October, 1881, Brown conveyed to plaintiff. The above constitutes plaintiff's chain of title. Defendant claims under a pre-emption settlement made in November, 1870, prior to the inception of any right on the part of the state.

The court instructed the jury as follows:

"The patent put in evidence is dependent for its validity upon the legality and validity of the listing of the land by the general government over to the state of California. If, at the time it was so listed, it had been pursuant to law, reserved or withdrawn for the benefit of the Atlantic and Pacific Railroad Company, and such reservation or withdrawal was then in force, and the land had not been restored, the listing was an absolute nullity, and the patent from the state based upon it is void."

An attempt was made by this instruction to attack the validity of the listing to the state, which is equivalent to a patent in passing to it the fee simple: Rev. St., U. S., sec. 2,449; Frasher v. O'Connor, 115 U. S., 116; 10 Stats. at L., 346. This the defendant could not do without connecting himself with the United States, the original source of title. To do this, under the claim of pre-emption which he here makes, he must show that he was, at the time of the selection made by the state, in privity with the United States: Terry v. Megerle, 24 Cal., 627; People v. Stratton, 25 Cal., 242; Page v. Hobbs, 27 Cal., 483; Carder v. Baxter, 28 Cal., 101; Tyler v. Green, 28 Cal., 408; Megerle v. Ashe, 33 Cal., 90. To establish this privity he must show that he was a duly qualified pre-emptioner according to law, at the time indicated above, and had fully complied with the laws of the United States at the time existing requisite to acquire the right of pre-emption: Page v. Hobbs, 27 Cal., 483; Megerle

v. Ashe, 33 Cal., 74; Quinn v. Kenyon, 38 Cal., 500; Burrell v. Haw, 40 Cal., 377. This he has not done. There is no evidence that he was not, at the time of his settlement on the land in conversy, the proprietor of three hundred and twenty acres of land in some state or territory of the United States or that he had not quit or abandoned his residence on his own land to reside on the public land. In the absence of proof of these facts, defendant cannot be regarded as of the class of persons entitled to pre-empt.

In this condition of the testimony, by giving this instruction, the jury would have been directed to find on an issue not in the case. As the defendant has not connected himself with the original and common source of title, he cannot show that the title is still in the United States, which would be the legal effect of proving that the land in controversy, when it was selected, was within a then existing reservation, or withdrawal for the benefit of the Atlantic or Pacific Railroad Company. If the defendant was not in a position to attack the listing or patent to the state, neither was he in a position to attack the patent of the state, unless he had shown that he was in some way in privity with the state, which he did not attempt to do.

Further, the evidence shows that the plat of the survey of the township, containing the land in controversy, was filed in the proper district land office on the thirteenth of June, 1872. Tapia filed his declaratory statement the twentieth of December, 1873. The statute of the United States required that the pre-emption right claimant should file his declaratory statement within three months from the date of the receipt at the district land office of the approved plat of the township, embracing his pre-emption settlement. See act of congress of March 3, 1853, to provide for the survey of public lands in California, section 6; section 2,266, Revised Statutes United States. The plat of survey to the land office comes approved from the surveyor-general's office or the general land office at Washington, and we shall assume that it was filed as soon as received, and that the day of receipt and filing are the same. It appears then that the defendant did not file his declaratory statement until more than eighteen months after the date of receipt of the plat of survey, and more than fifteen months after he was required by law to make such filing.

If the state made its selection of the land in controversy on the first day of October, 1873, as would seem to be indicated by the words, "located by state of California, October 1, 1873," in the certificate of Wm. R. Wheaton, register, found in the record, then the filing of Tapia came too late to affect the claim of the state: Page v. Hobbs, 27 Cal., 483; Megerle v. Ashe, 33 Cal., 82-3; Poppe v. Athearn, 42 Cal., 606. The claim of the state was then prior in point of time, and by reason of such priority its title derived by the listing in 1877 would be superior in right. The same would be the case as to the title of plaintiff here deriving title by patent from the state.

It follows from the foregoing that the order denying the new trial herein must be reversed.

A point is made by plaintiff as to the mode in which this case was tried. Counsel say that there were legal and equitable issues in the case; that these issues were submitted to a jury, who rendered a general verdict for defendant on which judgment was entered. It is urged that the mode in which the trial was had was irregular in this; that the equitable issues should have been first tried, and that for this irregularity there should be a reversal. We do not think that this point can be urged in this court on the record as it now stands, as the facts on which the point is based do not appear in a bill of exceptions or statement. But as the cause goes back for a new trial, we think it best to say that on such new trial the equitable issues, if not withdrawn, should be first tried, as directed in Martin v. Zellerbach, 38 Cal., 300.

Order reversed and cause remanded for a new trial.

MYRICK, J., and MORRISON, C. J., concurred.

No. 11,225.

BUTTE COUNTY *v.* BOYDSTUN ET AL.

In Bank. Filed December 16, 1885.

APPEAL—EMINENT DOMAIN—NOTICE OF APPEAL MUST BE SERVED.—Defendants, in an action prosecuted in the name of the people for the condemnation of lands belonging to them in severalty, are adverse parties each to the other, and upon an appeal by one from the judgment against him, notice of appeal must be served on the others.

APPEAL from a judgment of the superior court of Butte county, entered in favor of the plaintiff. The opinion states the facts.

T. B. Reardan & Son, for the appellant.

John C. Gray, F. C. Lusk and *Hundley & Gale*, for the respondents.

MYRICK, J. The defendants, Cartwright, Gray and Snider, petitioned the board of supervisors that a by-road be laid out and established over lands owned respectively by them, and the defendant Boydstun, and gave a bond for the payment of the cost of viewing and laying out the road. The petitioners consented to the taking of their lands for the road, but the defendant Boydstun resisted. By order of the board of supervisors this action was brought for the condemnation of the lands for a road. Judgment went for plaintiff, condemning a strip across the lands of all the defendants. The defendant, Boydstun, filed notice of appeal from the order denying his motion for a new trial, and from the judgment in favor of plaintiff, and against him, and the whole thereof, and from the final order of condemnation and the whole thereof. The notice was not served on the other defendants or their attorney. These defendants therefore move that the appeal be dismissed.

According to section 940, code of civil procedure, a notice of appeal must be served "on the adverse party or his attorney." The action was prosecuted on the petition of the defendants not served

with the notice; it is true the government, represented by the county, was in name prosecuting the action, but the defendants now moving were interested in having the judgment stand for the condemnation the whole distance, and in not having it reversed as to the lands of Boydstun. If the judgment of condemnation as to Boydstun should be reversed, it might seriously affect them, as it would leave their lands condemned, with no outlet over the lands of Boydstun. In this view they were parties adverse to him. We think Boydstun should have served his co-defendants with notice of appeal.

Appeal dismissed.

MORRISON, C. J., ROSS, J., SHARPSTEIN, J., and MCKEE, J., concurred.

No. 11,049.

SMITH v. STROTHER, AUDITOR, ETC.

In Bank. Filed December 18, 1885.

OFFICIAL SHORTHAND REPORTERS—ACT OF MARCH 21, 1885, UNCONSTITUTIONAL—LEGISLATIVE ACT.—The act of March 21, 1885, amending section 274 of the code of civil procedure, in respect to the payment of the salaries of reporters, provides, that "the official reporter shall receive, as compensation for his services, a monthly salary to be fixed by the judge, by an order duly entered on the minutes of the court, which salary shall be paid out of the treasury of the county, etc." *Held*, that such provision was in conflict with section 1 of article iii. of the constitution, in that it imposed legislative powers upon the judiciary.

THE DISTINCTION BETWEEN A LEGISLATIVE AND A JUDICIAL ACT is, that the former establishes a rule regulating and governing in matters or transactions occurring after its passage. The other determines rights or obligations of any kind, whether in regard to persons or property, concerning matters or transactions which already exist and have transpired before the judicial power is invoked to pass on them.

APPEAL from a judgment of the superior court of the city and county of San Francisco, entered in favor of the defendant, in a proceeding to compel him to audit plaintiff's demand as official reporter. The opinion states the facts. The prior opinion is reported in 7 West Coast Rep., 376.

W. M. Pierson and *A. L. Hart, amicus curiae*, for the appellant.

John. L. Love, for the respondent.

THORNTON, J. Reporters are by virtue of statute appointed by the several judges of the superior courts, and in the matter of their compensation the legislature passed an act for its regulation which was approved on the twenty-first of March, 1885: Stat. of 1885, p. 218. The act referred to is an amendment of section 274, code of civil procedure. By the provisions of this act the counties of the state are divided into ten classes, according to population, and the compensation of the official reporter for his services is to be by a monthly salary to be fixed by the judge by an order duly entered on the minutes of the court, which salary is to be paid out of the treasury of the county, in the same manner, and at the same time as the salary of county officers. The act further provides that the monthly salary to be fixed as above, shall not exceed a certain

amount specified for each class, as for instance, in counties having a population of one hundred thousand and over, which constitute the first class, the monthly salary shall not exceed three hundred dollars, in counties having a population of less than one hundred thousand and exceeding fifty thousand, said salary is not to exceed two hundred and seventy-five dollars. The sum which the salary shall not exceed becomes smaller in proportion to the smaller population of each class. The city and county of San Francisco is of the first class and the monthly salary of the official reporter in such city and county is not to exceed three hundred dollars.

The language of the act on which the question for decision depends is as follows:

"The official reporter shall receive as compensation for his services a monthly salary to be fixed by the judge by an order duly entered on the minutes of the court, which salary shall be paid out of the treasury of the county in the same manner and at the same time as the salaries of county officers."

It is urged that this act provides a mode of fixing a salary of an officer which is violative of the constitution, in this that the fixing of the salary in the mode provided would be the exercise of a legislative power.

Now, what is the judge empowered by the words above quoted to do? As we understand it, is to fix a salary in advance of service by the officer, not exceeding a certain sum per month, to be paid monthly, the salary so fixed to continue until the court shall make an order changing it, and be paid every month during its continuance, though in consequence of a vacation of the court no service is rendered.

The power is not to determine the value of services already rendered during a month, and to fix the amount of every monthly payment as compensation for services rendered with reference to the value so determined, not exceeding the limits prescribed by the act.

It is prescribed by the first section of article iii. of the constitution of this state, that "the powers of the government of the state of California, shall be divided into three separate departments, the legislative, executive and judicial; and no person charged with the exercise of powers properly belonging to one of these departments, shall exercise any functions appertaining to either of the others, except as in this constitution expressly directed or permitted."

Is the performance of the act devolved by the section of the statute above quoted on the judge of the superior court, by such judge, a legislative or judicial act? Such is the point presented for our determination.

What constitutes the distinction between a legislative and judicial act? The former establishes a rule regulating and governing in matters of transactions occurring after its passage. The other determines rights or obligations of any kind, whether in regard of persons or property concerning matters of transactions which

already exist and have transpired ere the judicial power is invoked to pass on them. As said by Woodbury, J., in Merrill v. Sherburne, 1 N. H., 204, "the former judicial tribunals decide upon the legality of claims and conduct, and the latter legislative tribunals, make rules upon which, in connection with the constitution, those decisions should be founded. It is the province of judges to determine what is the law upon existing cases. In fine, the law is *applied* by the one and *made* by the other." The legislature makes a general rule for the regulation of conduct and the admeasurement of right, the judiciary makes a special rule regarding a state of facts which have occurred after the enactment of the general rule by the former, by applying such general rule to the state of facts. The former defines rights and wrongs, by a rule laid down in advance. The latter enforces rights and redresses wrongs in cases arising on past occurrences. We have found no more accurate statement of the difference between a legislative and a judicial act than that expressed by Justice Field in his opinion in the Sinking Fund Cases.

"The distinction," says the learned justice, "between a judicial and a legislative act is well defined. The one determines what the law is, and what the rights of parties are, with reference to transactions already had; the other provides what the law shall be in future cases arising under it. Wherever an act undertakes to determine a question of right or obligation, or of property, as the foundation on which it proceeds, such act is to that extent a judicial one and not the proper exercise of legislative functions:" 99 U. S., 761.

The foregoing remarks are thus forcibly illustrated by reference to the cases—one, Lane v. Doe, *ex dem.* Dorman, 3 Scam., 238, decided by the supreme court of Illinois, and the other, Jones v. Perry, 10 Yerg., 59, by the supreme court of Tennessee—of which it is said: "Thus an act of the legislature of Illinois authorizing the sale of the lands of an intestate, to raise a specific sum, to pay certain parties their claims against the estate of the deceased for moneys advanced and liabilities incurred, was held unconstitutional, on the ground that it involved a judicial determination that the estate was indebted to those parties for the moneys advanced and liabilities incurred. The ascertainment of indebtedness from one party to another, and a direction for its payment, the court considered to be judicial acts which could not be performed by the legislature: 3 Scam., 238. So, also, an act of the legislature of Tennesse authorizing a guardian of infant heirs to sell certain lands of which their ancestor died seized, and directing the proceeds to be applied to the payment of the ancestor's debts, was, on similar grounds, held to be unconstitutional:" 99 U. S., 761. See, also, *Ex parte* Shrader, 33 Cal., 279; Cooley's Const. Lim., 110-112, *et seq.*, and cases cited in notes.

Tested by the foregoing we are of opinion that the fixing of the salary of a reporter by the judge in advance of services rendered, to be paid to him monthly, such salary to continue until change by the order of the judge and to be paid where, as in the recess of the

court, no services are rendered, would be an exercise of legislative power. In doing this the judge would be determining no right or obligation pertaining to person or property on facts already existing, but would be laying down a rule to be applied to a case the facts of which must afterwards transpire. As this would be an exercise of legislative power not expressly directed or permitted by the constitution to a court or judicial officer, the act must be declared unconstitutional.

The act of 1885 amending section 274, code of civil procedure, is different from the section as it stood before amended. Under the section as it stood before it was amended, the amount to be paid the reporter was fixed on valuation of the services rendered by the court or judge after they have been rendered. The court or judge under that section acted on a case which had transpired before any action was taken. The difference between the two is plain and palpable. However, it is not necessary, nor do we intend to hold that the latter mode is constitutional.

The order made by the judge in this case, it seems to us is not in accord with either the amended or unamended section. The order in this case did not fix the salary to be paid monthly. It fixes the compensation of Smith, the petitioner, for two days (the thirtieth and thirty-first days of March, 1885) at nine dollars and fifty cents per day. This is not an allowance of a monthly salary, as required by the act of 1885, and it differs from the section prior to its amendment because it is fixed with a view to be paid out of the county treasury and not by the parties as the act stood before amendment.

We find no error. Judgment affirmed.

MYRICK, J., MORRISON, C. J., MCKEE, J., and SHARPSTEIN, J., concurred.

No. 9,341.

MCKINNEY ET AL. *v.* ROBERTS.

In Bank. Filed December 18, 1885.

PLEADINGS—ALLEGATION ON INFORMATION AND BELIEF.—An averment that on, etc., "as the plaintiffs are informed and believe," at, etc., the defendant spoke, in the presence of certain named persons, the following words, etc., is a sufficient allegation that, according to the information and belief of the plaintiffs, the defendant did, in fact, speak the words alleged.

SLANDER—WANT OF CHASTITY—SPEAKING OF WOMAN AS PARAMOUR.—Under section 46 of the civil code, it is slanderous, as imputing want of chastity, to speak of a married woman as the paramour of a man not her husband.

APPEAL from a judgment of the superior court of Stanislaus county, entered in favor of the defendant. The facts are stated in the opinion of the department reported in 7 West Coast Rep., 504.

Schell & Bond, for the appellants.

W. C. Turner, for the respondent.

ROSS, J. It is a mistake to say that the allegation of the complaint is, in effect, that "plaintiffs are informed and believe defendant spoke

certain words," etc. The allegation is, "That on the first day of March, 1883, as the plaintiffs are informed and believe, at the county of Stanislaus, the defendant, addressing William Walker, spoke, in the presence of said William Walker and Geo. M. Dewel, the following words, to wit."

The effect of this is, that, according to the information and belief of the plaintiff, the defendant did, in fact, speak the words set out in the complaint at the time and place and under the circumstances stated. The allegation is sufficient, although it might and should have been made more definite and certain.

Section 46 of the civil code declares:

"Slander is a false and unprivileged publication other than libel, which:

"1. Charges any person with crime, or with having been indicted, convicted or punished for crime.

* * * * * * * * *

"4. Imputes to him impotence or a want of chastity; or,

"5. Which, by natural consequence, causes actual damage."

It does not admit of doubt, we think, that to speak of a married woman as the paramour of a man not her husband, is, of itself, to impute to her a want of chastity.

Judgment reversed and cause remanded, with directions to the court below to overrule the demurrer to the complaint, with leave to the defendant to answer.

MCKEE, J., MORRISON, C. J., MYRICK, J., and SHARPSTEIN, J., concurred.

No. 20,127.

PEOPLE v. BRICK.

In Bank. Filed December 18, 1885.

VERDICT—CONFLICT OF EVIDENCE.—A verdict will not be disturbed on the ground of insufficiency of the evidence to sustain it when the evidence is conflicting.

MURDER—VERDICT—DUTY OF JURY AS TO FINDING ON PUNISHMENT.—If the jury find the defendant guilty of murder in the first degree, and they also find that there is some extenuating fact or circumstance in the case, it is within their discretion to pronounce such a sentence as will relieve the defendant from the extreme penalty of the law. But the discretion is not an arbitrary one, and is limited to determining which of two punishments shall be inflicted, and is to be employed only when the jury is satisfied that the lighter penalty should be imposed. If the evidence shows the defendant to be guilty of murder in the first degree, but does not show some extenuating fact or circumstance, it is the duty of the jury to find a simple verdict of murder in the first degree and leave with the law the responsibility of affixing the punishment.

APPEAL from a judgment of the superior court of Colusa county, entered upon a verdict convicting the defendant of murder in the first degree, and from an order denying him a new trial. The opinion states the facts.

T. J. Hart, for the appellant.

E. C. Marshall, attorney general, for the respondent.

ROSS, J. 1. We would not be justified in disturbing the verdict on the ground that the evidence is insufficient to warrant it.

2. Appellant contends that the court below erred in instructing the jury: "If the evidence shows the defendant to be guilty of murder in the first degree, but does not show some extenuating fact or circumstance, it is the duty of the jury to find a simple verdict of guilty of murder in the first degree, and leave with the law the responsibility of fixing the punishment." The words quoted are found in the concluding clause of an instruction which reads: "If the jury find the defendant guilty of murder in the first degree, and they also find the further fact that there is some extenuating fact or circumstance in the case, it is within their discretion to pronounce such a sentence as will relieve the defendant from the extreme penalty of the law. The penal code invests a jury in a criminal case for murder with that discretion, but the discretion is not an arbitrary one, and is limited to determining which of two punishments shall be inflicted, and is to be employed only when the jury is satisfied that the lighter penalty should be imposed. If the evidence shows the defendant to be guilty of murder in the first degree, but does not show some extenuating fact or circumstance, it is the duty of the jury to find a simple verdict of murder in the first degree and leave with the law the responsibility of affixing the punishment."

There is, in this instruction, no error. The discretion given the jury by the statute, is not an arbitrary one, but is to be employed, as said by this court in People v. Welch, 49 Cal., 179, "only where the jury is satisfied that the lighter penalty should be imposed." Of course the jury could only be satisfied by the facts and circumstances of the case.

The instructions were clear and correct, and covered every phase of the case.

Judgment and order affirmed.

MCKEE, J., MORRISON, C. J., MYRICK, J., SHARPSTEIN, J., and THORNTON, J., concurred.

No. 8,870.

RHODES *v.* SPENCER.

In Bank. Filed December 18, 1885.

FEES OF JURY AND REPORTER—PAYMENT OF—STAY OF PROCEEDINGS PENDING.—Under section 274 of the code of civil procedure, and the act of March 1, 1872, the court has power to stay the further trial of an equitable action, until the parties, in whose favor a verdict on special issues has been returned, has paid the jury and reporter's fees.

APPLICATION for a writ of mandate. The opinion states the facts.

Vincent Neale, for the petitioner.

McKisick & Rankin, for the respondent.

ROSS, J. In an action in equity, to be tried in the superior court of Santa Clara county, certain special issues were framed and sub-

mitted to a jury, which returned its findings thereon, claimed by the petitioner here, who was the plaintiff in the action, to have been favorable to him. The court ordered the plaintiff to pay the fees of the jury, amounting to one hundred and forty dollars, and the fees of the reporter, amounting to forty dollars, and further ordered that all proceedings be stayed until the making of such payments.

If the court had the power to make such order, it is quite obvious that it should not be compelled by mandamus to proceed with the trial of the cause until the order is complied with. Statutory authority for the action of the court in the particular mentioned is found in section 274 of the code of civil procedure, and in the act approved March 1, 1872, statutes of 1871-2, page 188.

Writ denied and proceedings dismissed.

MYRICK, J., MCKEE, J., MORRISON, C. J., and THORNTON, J., concurred.

No. 20,156.

MCDOWELL v. LEVY, JUDGE, ETC.

In Bank. Filed December 18, 1885.

CRIMINAL TRIAL—BIAS AND PREJUDICE OF JUDGE.—A judge is not disqualified to try a criminal case by reason of mere bias or prejudice against the accused.

APPLICATION for a writ of prohibition. The petition alleged, in substance, that the respondent was disqualified to try the case. A motion for a continuance had been made and denied, trial had and the petitioner convicted of libel. The application was to prohibit the respondent from pronouncing sentence.

S. W. & E. B. Holladay, for the petitioner.

BY THE COURT. Application for a writ of prohibition.

The application is denied on the authority of People v. Williams, 24 Cal., 33. See People v. Mahoney, 18 Cal., 185; People v. Shuler, 28 Cal., 494.

No. 9,724.

PERRY ET AL. v. BRAINARD ET AL.

In Bank. Filed December 19, 1885.

MECHANIC'S LIEN—MUST BE FILED AFTER COMPLETION OF BUILDING.—Under section 1187 of the code of civil procedure, a sub-contractor, who has furnished materials used in building a house, cannot acquire a mechanic's lien thereon if the same be filed prior to the completion of the building.

APPEAL from a judgment of the superior court of Los Angeles county, entered in favor of the defendants, and from an order denying the plaintiff a new trial. The opinion states the facts.

Thom & Stephens, for the appellants.

Brunson & Wells and *J. Brosseau*, for the respondents.

ROSS, J. Defendant Brainard contracted to construct a certain dwelling-house for defendant Beaudry, for a certain sum of money, and the plaintiffs contracted with Brainard to furnish certain material for the house. The court below found that the lien which was sought to be enforced by the action was filed prior to the completion of the building, and was, therefore, prematurely filed. The statute reads: "Every original contractor, within sixty days after the completion of his contract, and every person, save the original contractor, claiming the benefit of this chapter, must, within thirty days after the completion of any building, improvement or structure, or after the completion of the alteration or repair thereof, or the performance of any labor in a mining claim, file for record," etc.: Code of civil procedure, sec. 1,187. It will be seen that the time prescribed by the statute for the filing of the plaintiffs' claim was "within thirty days after the completion of the building." Under a similar statute, the supreme court of Kansas lately held in two cases—Davis v. Bullard and Seaton v. Chamberlain, 4 Pac. Rep., 75 and 89—that a claim so filed was premature, and a lien thereon could not be enforced.

The reasoning of that court commends itself to our judgment, and is much the same as used here in Dingley v. Greene, 54 Cal., 335: "No privity of contract," said the court in Davis v. Bullard, "exists between the owner of the building and the sub-contractor, but the sub-contractor's rights are based simply and solely upon this contract made with the contractor. The contractor, and not the owner of the building, is the sub-contractor's debtor, and the sub-contractor has no right to claim that the building has been completed until the contractor under whom he claims has such right. Under the contract between the owner and the contractor, the owner agrees to pay the contractor a certain sum for constructing the building, and this sum is a fund which may be held under the statutes for the payment, so far as it will go, of all the claims of all the various sub-contractors, for work and materials furnished by them to the contractor, who is the principal and head of all; and all the parties entitled to payment or contribution out of this fund should be able to reach the fund and get their proportionate shares thereof at the same time or within the same period of time. Besides, one sub-contractor ought not to be able to reach this fund and appropriate it to the extent of his claim before another sub-contractor could reach it; for if the fund should not be sufficient to pay the claims of all the sub-contractors, then each sub-contractor should be paid only a proportionate share thereof. Now the amount of all the claims of all sub-contractors can be ascertained only after all the work and materials have been furnished and after the building has been completed, so far as the contractor is required to complete the same; for the whole of the work may in fact be done by sub-

contractors only; or the last item of work performed, or materials furnished, may be performed or furnished by a sub-contractor. The building in such a case would be completed by a sub-contractor; and the sub-contractor completing the building, or furnishing the last item of work or material therefor, is entitled to his proportionate share of the general fund equally with the sub-contractor who furnished the first item of work or material, or any immediate portion thereof. Of course, when the contractor has furnished, through himself or his sub-contractors, all the work and material which he has agreed to furnish, then the building is completed so far as he is concerned, and is also completed so far as all the sub-contractors under him are concerned; and the contractor and each of the sub-contractors may then file their respective statements for liens, and each will then become entitled to his proportionate share of the fund."

Other provisions of our statute go to show that this is the true construction of section 1,187. Section 1,190 declares that "no lien provided for in this chapter binds any building, mining claim, improvement or structure, for a longer period than ninety days after the same has been filed, unless proceedings be commenced in a proper court within that time to enforce the same; or, if a credit be given, then ninety days after the expiration of such credit; but no lien continues in force for a longer time than two years from the time the work is completed, by any agreement to give credit."

It is obvious that if a sub contractor may file his claim before the completion of the building at all, it may very well happen that the building may not be completed until more than ninety days after the claim is filed, and since section 1,190 of the code provides that no lien shall be binding for a longer period than ninety days after the same has been filed unless proceedings be commenced in a proper court within that time to enforce the same, it follows that under such a construction of section 1,187, a suit might be maintained to enforce the lien of a sub-contractor before the completion of the original contract. This would not only be to give one sub-contractor a preference over another, not allowed by the statute, but might subject the owner to suit and possibly his property to sale although strictly conforming to his contract. In further harmony with the conclusion that section 1,187 fixes a common starting point for all sub-contractors under the same original contractor, is section 1,195, which provides that "any number of persons claiming liens may join in the same action, and when separate actions are commenced, the court may consolidate them."

The danger suggested by appellants' counsel to sub-contractors in thus holding is not perceived, for the owner who pays to the original contractor with notice that the sub-contractor has not been paid will be liable to the lien of the latter, and it is an easy matter for the sub-contractor to acquaint the owner with such fact.

It becomes unnecessary to consider any other point made for appellants.

Judgment and order affirmed.

MYRICK, J., MCKEE, J., SHARPSTEIN, J., and THORNTON, J., concurred.

No. 9,839.

LITTLE *v.* JACKS.

In Bank. Filed December 18, 1885.

APPEAL—UNDERTAKING MUST BE FILED AFTER SERVICE OF NOTICE.—Under section 940 of the code of civil procedure, an appeal is ineffectual if the undertaking thereon be filed before the service of the notice of appeal.

MOTION to dismiss an appeal from the superior court of Monterey county. The opinion states the facts.

S. O. Houghton, for the appellant.

D. M. Delmas, for the respondent.

ROSS, J. The question on this motion is whether, under the provision of the statute which declares that "the appeal shall be ineffectual for any purpose unless within five days after service of the notice of appeal an undertaking be filed," etc., section 940, code of civil procedure, an appeal is effectual when the undertaking is filed *before* service of the notice of appeal.

If the statute is to be given effect, which must be done, we do not see how the question can be answered in any other way than in the negative. The statute expressly declares the appeal to be ineffectual for any purpose unless within five days after service of the notice of appeal the required undertaking be filed. *After* service, does not mean, and cannot be held to mean, *before* service. The undertaking relates to the notice, but without the notice, there is nothing to which it can apply. We must grant the motion.

Appeal dismissed.

MYRICK, J., MORRISON, C. J., THORNTON, J., and SHARPSTEIN, J., concurred.

No. 9,016.

MEHEREIN ET AL. *v.* BALL ET AL.

Department One. Filed December 19, 1885.

SALE SUBJECT TO GRADERS' REJECTION—RETENTION OF GOODS BY VENDEE.—Plaintiffs sold and delivered to defendants a certain lot of wool at a given rate per pound "subject to graders' rejection." The term graders' rejection meant that upon receipt of the wool by the vendees they would place it in the hands of wool graders, for the purpose of ascertaining what portion, if any, was inferior, for which, after notice to the vendors, a deduction from the contract price was to be allowed to the vendee. The custom of the place of sale required the graders to examine the wool fleece by fleece. *Held*, that it was the duty of the defendants to have the examination conducted in such manner; that upon their failure so to do, after retaining the wool, they were liable for the contract price; and this although after the plaintiffs' refusal to abide by their rejection, they offered to have it graded fleece by fleece.

APPEAL from a judgment of the superior court of the city and county of San Francisco, entered in favor of the plaintiffs, and from an order denying the defendants a new trial. The opinion states the facts.

Chickering & Thomas, for the appellants.

Mich. Mullany and *Joseph Hutchinson*, for the respondents.

Ross, J. The complaint charges, and defendants by their pleading admit, that the plaintiffs sold and delivered to defendants a certain lot of wool at the rate of twenty and one-half cents per pound "subject to graders' rejection." It is alleged in the complaint that the term "graders' rejection" was understood by the parties to mean, and is generally understood among wool dealers in the city of San Francisco, where the transaction occurred, to mean, that upon the receipt of the wool by the defendants they should place it in the hands of persons skilled in grading wool, known as wool-graders, for the purpose of ascertaining what portion, if any, of the wool is taggy and scabby, and if any portion of it should be found to be taggy and scabby, that defendants should forthwith notify plaintiffs and furnish them with a certificate of the graders to that effect, giving the weight and amount of the wool found taggy and scabby, which should be deducted from the gross amount delivered to the defendants and returned to plaintiffs, and the balance of such gross amount should be paid for forthwith at the rate per pound agreed on—plaintiffs to be apprised of the result of the grading within a reasonable time, in this case ten days, from the delivery of the wool to defendants.

The meaning of the term "graders' rejection," as alleged by the plaintiffs, is not controverted by the defendants, except they allege in their answer that it also includes the right of the graders to reject any or all wool of a substantially different character from that purchased.

Thirty-three of the forty sacks of the wool delivered to defendants were graded and accepted by defendants, and by them shipped East; and they also took from one or two of the remaining sacks enough wool to fill an order they then had. But all these remaining sacks the defendants claimed to have been rejected by the graders, and that the plaintiffs were notified of such fact within a reasonable time. But the plaintiffs, upon receiving the notice, contended that the wool had not been graded in accordance with custom and the understanding of the parties, in that the bales claimed to have been rejected were not examined fleece by fleece, and refused to abide by the rejection. At the trial in the court below, a good deal of testimony was given as to the custom in San Francisco in respect to the mode of grading—that on the part of the plaintiffs tending to show that the custom requires the grading to be done fleece by fleece, whereas that on the part of the defendants tended to show that, by the custom prevailing among dealers in wool at this place, it was sufficient for the graders to rip the sack open from one end to the other, and through such opening conduct their examination. Without conflict, the evidence shows that the latter was the method adopted by the graders in this instance. But appellants' counsel say that the evidence also shows, without conflict, that when the plaintiffs objected to the report of rejections made by the graders, the defendants at once offered to have the remaining sacks graded fleece by fleece, and plaintiffs refused. But, notwithstanding such

refusal, it was not only the right, but the duty, of defendants to have the grading conducted fleece by fleece; for, in view of the verdict upon the conflicting evidence, we must take it that the custom so required. They failed in that duty, although retaining the wool in their possession, and, so far as appears, still retaining it. Such being the case, we are of opinion that they become liable to the plaintiffs for the full amount delivered to them at the rate per pound agreed on. A part of this amount was paid prior to the bringing of the action, and for the balance the plaintiffs properly recovered judgment in the court below.

Judgment and order affirmed.

MCKEE, J., and MCKINSTRY, J., concurred.

No. 9,042.

LEWIS ET AL. *v.* STEIGER ET AL.

Department One. Filed December 19, 1885.

EVIDENCE—CROSS-EXAMINATION—IMPEACHMENT OF WITNESS.—Where a witness for the plaintiff denies, on cross-examination, that he offered to procure testimony for the defendant, for a money consideration, the defendant is entitled to give evidence to the contrary. Such case is an exception to the rule that if a question is put to a witness which is collateral or irrelevant to the issue, his answer cannot be contradicted by the party who asked the question, but is conclusive against him.

APPEAL from a judgment of the superior court of the city and county of San Francisco entered in favor of the plaintiffs, and from an order denying the defendants a new trial. The opinion states the facts.

C. H. Parker and *J. J. Bart*, for the appellants.

Roche & Desbeck, for the respondents.

ROSS, J. On the trial of this cause in the court below, one Knight was examined as a witness in rebuttal and gave testimony material for the plaintiff; on cross-examination he was asked in effect if he had not, at a certain time and place, proposed to the defendant to procure testimony for him in the case upon the payment by defendant of two hundred and fifty dollars. Knight, having answered in the negative, the defendant was called in his own behalf in surrebuttal, for the purpose of showing that such a proposal had been made by Knight, and of thus impeaching his testimony. To this plaintiff objected, upon the ground that as the transaction for the purchase of testimony was a matter purely collateral to the issues in the case, and was brought out by defendant on cross-examination, he was concluded by the answers given. The objection was sustained and the ruling of the court in that regard constitutes the ground of the appeal.

The ruling was erroneous. The case comes within the exception to the rule, that if a question is put to a witness which is collateral

or irrelevant to the issue, his answer cannot be contradicted by the party who asked the question, but is conclusive against him. It does not admit of doubt that if Knight did in fact offer to procure testimony for defendant, in the case for a money consideration, it was a corrupt proposal, and would tend to impeach the testimony that he, himself, had given. "The rule will be found a general one," said the court in Morgan v. Fries, 15 Barb., 354, "and will be sustained by the cases, that when the witness on his cross-examination denies a particular fact going barely to impeach his general character and credit, witnesses cannot be called to contradict him. But a distinction is made between the right to contradict the witness in respect to any fact relating to his conduct in the particular cause, and the right which goes to the point of his being a man worthy of credit generally. This distinction was taken by the court in Yervins' case, 2 Camp., 647. The distinction, however, has sometimes been overlooked, as was done by Lawrence, Justice, in Harris v. Luppet, 2 Camp., 638, decided at *nisi prius*. This case was undoubtedly wrongly decided, and the principle was applied in the haste of *nisi prius*. It is not to be doubted that where a witness for the defendant has attempted to dissuade one of the plaintiff's witnesses from attending the trial, and denies on his cross-examination that he has done so, the plaintiff is entitled to give evidence to contradict him in this respect. Such evidence is addressed to his conduct in the particular suit, and ought to detract very much from his credit in the suit; and such evidence is admissible to affect the credit of the witness in the particular case: Atwood v. Welton, 7 Conn., 66; 2 Camp., 637. And so in the case under consideration, it was competent for the defendant to show that the witness Miller had endeavored to corrupt the witness Webster and induce him to swear false in this particular suit, to the prejudice of defendant." See, also, Davis v. Roby, 64 Me., 427; State v. Patterson, 2 Iredell, 346; State v. Roberts, 81 N. C., 65; Bullard v. Lambert, 40 Ala., 204; 1 Greenleaf on Ev., sec. 462; 2 Taylor on Ev., sec. 1,451.

The record shows that the attention of the witness Knight was sufficiently called to the subject and his denial sufficiently explicit to allow the contradictory evidence offered by defendant.

Judgment and order reversed and cause remanded for a new trial.

McKEE, J., and McKINSTRY, J., concurred.

No. 9,254.

IN RE SMITH.

Department One. Filed December 19, 1885.

BANKRUPTCY—NO DISCHARGE IN STATE COURT, AFTER REFUSAL IN UNITED STATES DISTRICT COURT.—The jurisdiction acquired by the United States district court in a proceeding in bankruptcy is exclusive. Consequently, an insolvent who has been refused a discharge from his debts, in such court, can not be discharged from the same debts, in a state court, under the insolvency act of 1880.

THE SAME—DISCHARGE—PRIOR BENEFIT OF ACT.—Under such act no discharge can be granted, if the debtor, in case of voluntary insolvency, has received the benefits of that or any other act of insolvency or bankruptcy within three years next preceding his application for discharge.

APPEAL from a judgment of the superior court of the city and county of San Francisco. The opinion states the facts.

Williams & Bixler, for the appellant.

G. F. Gordon, *E. B. Young* and *H. G. Platt*, for the respondent.

ROSS, J. That the judgment of the court below granting the petitioner a discharge from his debts is erroneous is clear. The debts from which he sought to be discharged by the proceedings in the court below, which were had under the state insolvency act of 1880, were incurred and were existing prior to August 30, 1878. On that day this petitioner filed a petition in the district court of the United States in and for the district of California, praying to be adjudged a bankrupt pursuant to the provisions of the then bankrupt act of the United States, and to be discharged from his debts provable thereunder; and such proceedings were had that on the thirty-first day of August, 1878, the petitioner was duly adjudged a bankrupt by the said district court, and subsequently an assignee of his estate duly appointed, to whom all the property of the bankrupt was duly assigned. In due course of proceedings, the petitioner filed a petition for a certificate of final discharge, which, coming on regularly to be heard, was by the court denied, and judgment entered accordingly. It is well settled that the jurisdiction acquired by the United States district court in the matter is exclusive. The judgment appealed from purports to discharge petitioner from debts from which the United States court, having jurisdiction of the matter, refused to discharge him. It is clear that the state insolvency act affords no warrant for such a judgment, nor, indeed, for any of the proceedings on the part of the petitioner. One of the provisions of that act is that the petitioner shall surrender his property, books, etc., for the benefit of his creditors. But petitioner took his property to another forum and comes here to be discharged from his debts. Besides, the insolvent act of 1880, in terms, provides that no discharge shall be granted if the debtor, "in case of voluntary insolvency, has received the benefits of this or any other act of insolvency or bankruptcy within three years next preceding his application for discharge."

Judgment reversed and cause remanded, with directions to the court below to dismiss the proceedings.

MCKEE, J., and MCKINSTRY, J., concurred.

WEST COAST REPORTER.

WHOLE NO. 105. DECEMBER 31, 1885. VOL. VIII. No. 9.

SUPREME COURT OF OREGON.

DAWSON *v.* DOWNING ET AL.

Filed November 30, 1885.

ASSIGNMENT FOR BENEFIT OF CREDITORS—FRAUD—SETTING ASIDE.—Ordinary contract creditors, who have not reduced their claims to judgment, or proved them under the insolvency act, cannot have a general assignment for the benefit of creditors set aside, on the ground that the same is fraudulent as to creditors.

APPEAL from the circuit court. The opinion states the facts.

Wm. Holmes and *Samuel Richardson*, for the appellant.

Wm. Ramsey, for respondent Coffey; *Tilmon Ford*, for respondents Gilbert and John W. Minto.

THAYER, J. This case comes here upon appeal from a decree entered upon a decision sustaining a demurrer to a complaint.

It is alleged in the complaint that the respondent James Coffey had a stock of furniture and tobacco and cigars, and for a long time had been engaged in a general merchandise business, vending said articles; that he became indebted to divers parties, on account of said business, amounting to four thousand dollars, and was owing other liabilities amounting to seven hundred dollars; that he was indebted to the respondents A. T. and F. N. Gilbert, partners under the firm name of Gilbert Brothers, in the sum of six hundred and fifteen dollars and fifty cents, and that he owed, or pretended to owe, the respondent Johannah Coffey, who is the wife of said James Coffey, seven hundred dollars; that he was insolvent, and contemplated insolvency, and while in that condition, and on the eleventh day of December, 1884, he made a general assignment to the respondent Downing, of all his property for the benefit of his creditors; that on the ninth day of December, 1884, said James Coffey, being then insolvent and intending to make the said assignment, entered into an agreement with the said Gilbert Bros., whereby, and as a part of the same transaction, with the said assignment, and for the purpose of preferring the said Gilbert Bros. in the payment of their said demand, over other of his creditors, executed to the said Gilbert Bros. a chattel mortgage upon a large portion of his said property, consisting of the said furniture; that on the tenth day of December, 1884, said James Coffey, while in the condition mentioned and intending to make the said assignment, entered into an agree-

ment with his wife, the said Johanna Coffey, whereby, and as a part of the same transaction with said assignment, and with a similar design of preference of payment of her demand, executed to her a bill of sale of the said stock of tobacco and cigars, and put her in nominal possession thereof; that soon after the execution of said chattel mortgage to said Gilbert Bros., the respondent John Minto, acting for them, wrongfully took possession of the property included in the said chattel mortgage and converted it to their own use; that it was worth two thousand five hundred dollars; that at the time said James Coffey executed said chattel mortgage and bill of sale he was indebted in a large amount to divers persons on account of said business, as before mentioned; that said creditors last referred to assigned their claims to said appellant; that he has no property out of which to recover said claims, except the property included in said chattel mortgage and bill of sale, and that if the owner of said claims is compelled to take his distributive portion of said property in the hands of said assignee, and not allowed any portion of the property mortgaged and sold, as mentioned, he will not realize more than from five to ten per cent; that said assignee is acting in good faith so far as his said trust is concerned, but is powerless to question the validity of the said instruments; that the assignment to him was not made in good faith. Said complaint contained a prayer for an accounting for said property mortgaged and pretended to be sold, and that it be transferred into the hands of an officer of the court; that the said assignment be set aside, and the assignee account for the property in his hands and pay it over to such officer, to the end that all the property of the said James Coffey, including that mortgaged and pretended to be sold to his wife, be distributed among the creditors of the said Coffey in accordance with equity, etc.

The demurrer to the complaint was upon two grounds, first, because they were two causes of suit improperly united, and second, because the said complaint did not state facts sufficient to constitute a cause of suit. The second ground is the more important one. It raises the question as to whether creditors at large, having mere legal claims against a debtor on account of ordinary contract debts, have a right to go into a court of equity to enforce them where the debtor has attempted to dispose of his property in order to defraud them.

That a general assignment for the benefit of creditors may be set aside when made in violation of the insolvent law there can be no question; but whether it can be done by an ordinary creditor of the insolvent before he has obtained a judgment upon his claim or in some manner secured a lien upon the debtor's property, is more serious. I am strongly of the impression that he cannot. Where a debtor attempts to dispose of his property in any way, in order to defraud his creditors, they may proceed and attach by taking it from the debtor, or by garnishment, if in the hands of another party. They may pursue this remedy in case of a general assignment for the benefit of creditors if it be fraudulent: Moss v. Hum-

phrey, 4 Green, Iowa, 443; Burrows v. Lehndorff, 8 Iowa, 96; Ruble v. McDonald, 18 Iowa, 493. I cite these authorities with more confidence from the fact that our insolvent law was, to a great extent, taken from the Iowa law upon that subject. The creditors may also in such a case, proceed and recover judgment at law, and, after exhausting the ordinary legal remedy to enforce payment, commence a suit in equity in the nature of a creditor's bill to obtain satisfaction of their claims.

An attempt to defraud creditors through the means of the insolvent law, is as mischievous as an attempt to effect it in any other way, and a court of equity would lend its aid to prevent it in that case as readily no doubt as in any other, but it would not exercise principal jurisdiction, would only furnish the creditor auxiliary assistance to obtain his right. It would never attempt to enforce the payment of contract debts except under particular circumstances. It must be a case where a fund has been set apart, or in some manner devoted to the payment of a class of debts, before equity will interfere, until the legal remedy is exhausted, such as, in a case of prize money made by a privateer and required by articles to be distributed: 13 Ves., 397; the assets of a limited partnership where the statute constituted them a special fund for the benefit of all the creditors of the partnership: Juness v. Lansing, 7 Paige, 584; and the like cases.

I think that in this case, if the appellant had proved his claim under the provisions of the insolvent act, he could then have resorted to equity to have had the fund applied to the payment of the debt, and to prevent a fraudulent diversion or misapplication of it. The assignment vests in the assignee the title to all property belonging to the debtor at the time of making the assignment. The statute as printed does not read so, but it is on account of typographical error. See enrolled act. After a creditor has presented his claim under oath as provided by the act, I think he would have such an interest in the assets of the insolvent as would enable him to enforce the remedy above suggested. He certainly ought to after its allowance. But to have the assignment set aside and the court undertake to administer upon the estate as prayed in the said complaint would, to my mind, be an unprecedented proceeding. The creditor's claim must be adjudicated upon, or presented and allowed in the insolvent proceedings, before the aid of equity could be invoked.

I am of the opinion, therefore, that the decision sustaining the demurrer should be affirmed.

WALDO, C. J., CONCURRING. This is a suit brought in the interest of certain alleged creditors of James Coffey, to set aside certain conveyances of personal property made by Coffey to defraud, as alleged, the said creditors. There is a fatal objection to the suit in its inception. The claims of the complaining creditors have not been reduced to judgments, and executions returned unsatisfied.

They are all simply contract creditors alleging a simple indebtedness to them on the part of the alleged debtor. Such suits cannot be maintained. The ground of equitable jurisdiction in such cases is fraud in the disposal of the debtor's property, and which, unless equitable remedies are applied, will defeat the collection of the debt. But before the fraud can be set up, the legal facts which are conditions precedent must be established. That they must be established at law is implied in the nature of the facts themselves. It is exclusively the province of a court of law to say that there is a legal debt and that it cannot be made at law. Therefore a creditor's bill "must be preceded by a judgment at law establishing the measure and validity of the demand of the complainant for which he seeks satisfaction in chancery:" Smith v. R. R. Co., 99 U. S., 401, and see Baxter v. Moses, Supreme Court, Maine, 1885. So in Parish v. Lewis, Freem. Ch., Miss., 306, the court says: "But if you wish to reach equitable assets, or other things not subject to execution at law, you must show that you have exhausted your remedies at law by a return of an execution unsatisfied, as the *foundation* of your right to come into this court. In such case, the complainant's *right* to relief in this court depends upon his having run his execution at law without being able to satisfy his judgment. It is not a mere technical objection, but goes to the very foundation of the suit, and is not waived even by a general answer. The complainant must show an execution returned unsatisfied, and no state of facts will excuse such a return: Brinkerhoff v. Brown, 4 Johns. Ch, 671, 687; McElwain v. Willis, 9 Wend., 548; Scriven v. Bostwick, 12 McCord's C., 416; Hadden v. Spader, 20 Johns., 554; Moore v. Young, 1 Dana, 516.

Hodges v. Silver Hill Mining Co., 9 Or., 200, was not a suit to reach equitable assets of the debtor. There the stockholders were primarily liable in equity. Their liability may be likened to that of a guarantor after insolvency of the principal debtor in which insolvency may be proved like any other fact in the cause of suit: Pars. on Notes and Bills, 142, and cases cited.

The judgment must be affirmed.

SCHNEIDER *v.* SEARS.

Filed November 30, 1885.

ATTACHMENT PROCEEDINGS ARE STATUTORY, and unless the statute is strictly pursued, no right is acquired under them.

ATTACHMENT OF PERSONAL PROPERTY HOW MADE.—Under section 147 of the civil code, personal property capable of manual delivery to the sheriff and not in the possession of a third person, is attached by taking it into custody; other personal property by leaving a certified copy of the writ and a notice specifying the property attached. As to such latter property, it is not sufficient to merely post a copy of the attachment on the property claimed.

THE SAME—EXPENSES OF SHERIFF IN KEEPING PROPERTY.—A sheriff is entitled to be paid for the necessary expenses incurred by him in taking care of and preserving property attached. The reasonableness of such charges should be determined by the court.

THE SAME—PROCEEDING TO TRY RIGHT TO PROPERTY ATTACHED.—In a proceeding to try the right of property, taken under attachment, under section 258 of the civil code, the costs and disbursements must be paid by the party against whom the verdict is given, or, if no verdict be given, then by the party who withdrew his claim, or directed the property to be discharged. The costs and disbursements in such proceeding have no connection with the costs and disbursements in the attachment suit.

APPEAL from the circuit court of Multnomah county. The opinion states the facts.

D. Goodsell and *J. V. Beach*, for the appellant.

F. V. Drake, for the respondent.

THAYER, J. Appeal from a judgment of the circuit court for the county of Multnomah.

The respondent brought an action against the appellant in said court to recover money collected by respondent as sheriff, upon execution issued from a judgment in favor of respondent against Bachman Brothers, and which the respondent had failed to pay over. The judgment against Bachman Brothers amounted to two thousand and sixteen dollars and fifty-five cents. The sheriff realized by the sale of personal property upon the execution two thousand and thirty-four dollars and eighteen cents, and only paid over one thousand three hundred and forty-nine dollars and twenty-one cents; the balance he retained for fees and charges, and one hundred and fifty-seven dollars and thirty-six cents thereof to satisfy a judgment recovered by one Stearns Brothers against said Bachman Brothers in justice's court, and which, he alleged, had priority over the judgment of Schneider.

The complaint in the action was at great length, and to which was annexed a number of exhibits which were therein referred to. It not only contained the facts constituting the cause of action, but the evidence of them. Such an action formerly was an action of assumpsit, or case: Shepard v. Hoit, 7 Hill, N. Y., 198; and there is now no necessity of alleging in such a case anything beyond the facts constituting the cause of action. A general statement of the recovery of the judgment by the respondent against Bachman Brothers, the issuance of execution thereon, the realization of the money and neglect to pay over the amount, was all that was necessary to have been alleged. The appellant filed an answer to the complaint which covered a large area of ground, and the two presented quite extensive and voluminous pleadings. The court, upon motion of the respondent's attorney, struck out nearly all the answer, and if it had applied its judicial pruning knife liberally to the complaint, it would have left a reasonably moderate issue between the parties.

The gist of the complaint was that the appellant had received the money, and unjustly and wrongfully retained in his hands, and refused to apply to the satisfaction of the execution, the sum of six hundred and one dollars and fifty-six cents thereof, over and above fees allowed by law. The appellant denied that, of said moneys received by him under said writ of execution, he unjustly or wrongfully retained in his hands said sum, or any sum; denied that the

return to the attachment in the action against Bachman Brothers set forth in the complaint was all the return made by the appellant, and denied that the appellant, as sheriff, attached the two safes, or either of them, mentioned in the complaint, except subject to a prior attachment in favor of the said Stearns, issued in the action in the justices's court. The latter two denials, however, have to be picked out from among affirmative matter set forth as a defense, and were included in the part of the answer stricken out. The said statement contained an account of expenses the appellant claimed to have incurred in taking care of the property attached, and in selling it, and in defending his right to attach and hold it as against a third party who claimed its ownership; and, also, as to the attachment having been served subject to the prior attachment, and the payment of the judgment from the money received on the sale of the property to satisfy the judgment recovered in the justice's court.

The denials and statements were loosely made and many of the allegations of affirmative matter, were frivolous. The grounds of the motion to strike out the part of the answer were that it was "irrelevant and redundant." After it was granted, and the appellant had failed to amend the answer, the respondent's attorney, moved for judgment upon the pleadings, which the court granted, and thus terminated the litigation in that forum. A case of so much importance is not often presented in which the pleadings are so clumsily and unskillfully drawn, and the whole affair so curtly disposed of upon technicalities, as this one. Why a concise statement of the facts constituting the cause of action, and the defense, was not set forth when both parties were represented by able attorneys, is beyond my comprehension. There was but a single question in the case to be determined; had the appellant as sheriff paid over to the clerk of the court all the money realized upon the execution as required by law? There was no dispute as to the amount received by him, upon the sale of the property, held under the attachment. The appellant claimed to have applied the portion of the money in controversy to the payment of the expenses incurred in keeping it, and a hundred and fifty-seven dollars and thirty-six cents thereof, to satisfy the Stearns judgment. If the said expenses were legitimate, and the Stearns judgment entitled to priority, then the appellant as sheriff had discharged his duty and was not liable.

But the facts set out in the answer show, I think, that the latter judgment did not have legal preference over that of the respondent's. The appellant avers in his answer, after setting out at full length the commencement of the action in the justice's court and the issuance of attachment, that said attachment was placed in the hands of a constable for service, and was by said constable executed, by levying the same upon one large safe together with other personal property then in the office of the defendants in the writ, at No. — First street, Portland, Oregon; that, thereafter, on November 6, 1883, and after the time for answering had expired, a judgment was obtained in the said action, and the property attached ordered to be sold. It

would seem to appear from said amended return, which the respondent's attorney generously made an exhibit of in his complaint, that the attachment was served by posting a copy on the safe claimed to have been attached. Section 147 of the civil code provides how property may be attached, viz.: Personal property, capable of manual delivery to the sheriff and not in the possession of a third person, shall be attached by taking it into his custody; other personal property by leaving a certified copy of the writ and a notice specifying the property attached. Attachment proceedings are statutory, and unless the statute is strictly pursued no right is acquired under them. The pleadings or exhibits do not show that either of the safes was taken into custody by the constable or any such copy of the writ or notice served. Besides, as suggested by the respondent's counsel at the hearing, the sheriff should not have undertaken to decide any such question of preference. He could have referred the matter to the court and followed its direction concerning the course to be pursued. The court had power to control his conduct in reference to the affair, section 884, subdivision 5, civil code, and he could have submitted the question to it and been directed as to his duty in the premises. In default of that he should have exacted a bond of indemnity before paying over the money, except as his writ commanded. I do not think the sheriff justified in paying out the one hundred and fifty-seven dollars and thirty-six cents upon the Stearns judgment.

The respondent's counsel contended, upon the argument, that the sheriff was entitled to no recompense for any money paid out for taking care of the property while under attachment and execution; but I cannot assent to that view. I do not think a sheriff has any right to employ keepers, repair the property, or advertise the sale of personal property in a newspaper, and charge the expense as a part of his fees: Cutter v. Howe, 122 Mass., 541. It is his duty to take the property into his custody and keep it until it is finally disposed of. He has no right to employ an army of keepers, or do any act at the expense of the parties or of the property unless it be absolutely necessary in order to preserve it. There may be expenses incurred in keeping property levied upon by attachment or execution, for which the sheriff should be reimbursed beyond the statutory fees. The rule laid down in Murfree on Sheriffs, I think, is correct. The author says that "the general principle of law on this subject is that where an officer is required to perform a duty involving disbursements of money out of pocket he must be reimbursed, and consequently the necessary expenses incurred by a sheriff in taking care of and preserving property attached, are to be assessed and paid to him above the ordinary caption fee. These expenses do not, like taxable costs, abide the result of the suit, but constitute a charge upon the assets. The test, however, of these allowances is their necessity."

Property may often be levied upon which necessarily requires the expenditure of money. Live stock might require to be fed. Other

property might be in a condition to require something done at once to prevent its spoliation, and other still require secure storage or protection. In all such cases the officer should be repaid the amount of money reasonably expended in that behalf. But in all cases where it is possible to apply to the court for directions in regard to such matters the application should be made. The court has a right to control the sheriff in such affairs, and its attention should be called to the matter whenever it reasonably can be, and I believe the court should audit and allow the expenses in all such cases. Such expenses come out of the proceeds of the sale of the property when sold, or out of the party failing to sustain his writ. They are allowed the sheriff as a matter of justice, and the court should be the judge in its allowance, and not the sheriff, as he is a party in interest.

I think the facts set forth in the appellant's answer in this case show that he was entitled to be paid something on account of the expense he evidently was put to in order to keep the property after it was attached until it was finally sold on the execution. I do not think that the amount he may have paid therefor should govern, for he may have been extravagant, but he should be allowed such reasonable sum as was necessary to be paid in order to keep it properly. The reasonable expense of removing and storing it would be a proper item or an amount that would cover such expense in case the appellant followed some other course. Hiring a watchman, or having the property at the place of caption, might, in some cases, entail as little expense as any course that could be pursued, but if the appellant adopted a mode of keeping the property where a less expensive one would have answered as well, he should only be allowed the amount the cheaper mode would have cost. The case will have to go back for trial upon this question.

There were some other questions presented upon the argument which I have not deemed necessary to notice, further than the alleged hiring of the keepers, summoning of the jurors and witnesses to try the rights of property, by the appellant at the request of the respondent and of the promise of the latter to pay the same. The allegation is in the alternative. It is to the effect that at the respondent's especial instance and request or by his authorized attorney Frank V. Drake, the appellant hired keepers, etc. It is too uncertain to serve any purpose as a pleading. It was contended upon the argument that an agreement, between the sheriff and the plaintiff in the writ in regard to such matters would be good and valid. I presume it might be in some instances; where it did not relate to the performance of a duty on the part of the officer enjoined by law, it would probably be valid as between the said parties. But I very much doubt whether it would create any liability that could be enforced in the proceedings. The appellant's services in subpœnaing witnesses to try rights of the property, though subpœnaed at the instance of the respondent, could not be paid from the money realized upon the execution; that would wrong the defendant in the execution. Bachman Brothers had the right to have

that money applied upon their debt. The appellant, however, may have a claim against the respondents therefor, but it is a personal claim, and the latter must look to the claimant of the property in that contest to recover the amount of liability incurred on account thereof.

The statute provides that the costs and disbursements of the trial in such cases, shall be paid by the party against whom the verdict is given, or if no verdict be given then by the party who withdrew his claim, or directed the property to be discharged, as the case may be: Sec. 258, civil code. The costs and disbursements in such a proceeding have no connection with the costs and disbursements in the action, the adjustment and payment of the former are regulated in the proceeding in which they are created and the appellant had no right to include them in his fees or charges in the original action.

The judgment must be reversed and a new trial had as before indicated.

HURST v. BURNSIDE.

Filed November 30, 1885.

EVIDENCE—VOLUNTARY WITNESS—NON-PAYMENT OF FEES.—The facts that a witness was not subpœnaed by the party calling him, and attended the trial from a distance, without any fees being paid to him, are not of sufficient importance to justify the jury in drawing any inference therefrom prejudicial to the witness.

ARGUMENT OF COUNSEL MAY BE LIMITED.—Under section 194 of the civil code, the trial court has power to limit the time in which counsel can address the jury to less than two hours.

NEGLIGENCE—CONTRIBUTORY—OPERATIVE AMONG MACHINERY.—It is the duty of an operative, engaged in working in the vicinity of machinery, to exercise his thinking faculties, and give careful attention to the business in which he is engaged. If he fails so to do, and is injured in consequence, he is guilty of such contributory negligence as to prevent his maintaining an action therefor.

THE SAME—INSTRUCTIONS AS TO CONTRIBUTORY NEGLIGENCE.—In an action to recover for a negligent injury, an instruction that "one party cannot recover for an injury occasioned by the negligence of another, unless he himself is without negligence contributing to the injury complained of," is not erroneous in not specifying the degree of contributory negligence which will prevent a recovery, if the instruction immediately following supplies such omission.

APPEAL from the circuit court of Multnomah county. The opinion states the facts.

A. S. Bennett, for the appellant.

C. A. Dolph, for the respondent.

THAYER, J. Appeal from the circuit court for the county of Multnomah, from a judgment rendered in an action brought by the appellant against the respondent, to recover damages.

It is alleged in the complaint in said action, in substance, that on the eleventh day of March, 1883, and prior thereto, the respondent was the owner of, and engaged in running and operating a flouring mill at Oregon City, Oregon; that on said date, and for several weeks prior, the appellant was in the employ of the respondent in and

around the mill, as his servant to watch the machinery thereof for a compensation to be paid therefor, and it was his duty to ascertain when said machinery was heating or required oil, and to oil it when necessary; that on said eleventh day of March, 1883, and for a long time prior thereto, the machinery was out of repair, and in an unsafe and dangerous condition, and the wheels upon many of the shafts belonging to the machinery were fastened there by keys, which was an unnecessary, dangerous and unsafe way of fastening them, and that said keys projected out from the ends of said shafts in an unnecessary and dangerous manner; that the respondent had notice of these matters, but had negligently, and with gross and wanton disregard of the safety of his employees generally, and of the appellant in particular, continued to operate said mill and to permit said machinery to remain in such unsafe and dangerous condition; than on said date, and in consequence of said respondent's neglect in the premises, one of said keys caught appellant's hand while he was prudently and carefully performing his duties as such servant, and, without fault upon his part, threw it between the wheels of said machinery, whereby it was injured to such an extent that he was obliged to have two of the fingers amputated, and for which he claimed general and special damages amounting to ten thousand dollars. The respondent, in his answer to the complaint, denied all the material allegations thereof, and alleged affirmatively that the injury was received in consequence of the appellant's own carelessness in the premises.

The issue between the parties involved mainly the questions, whether the respondent was guilty of negligence and carelessness in consequence of the condition of the mill at the time the affair occurred, and, if so, was the appellant careless and negligent concerning the matter, and did his carelessness and negligence contribute to the injury? The evidence seems to have been conflicting as to whether the mill was in an unsafe and dangerous condition as alleged in the complaint, and as to whether the appellant was "prudently and carefully performing his duties as such servant" at the time he received the injury. The mill seems to have been in the same condition at the time the accident happened that it was when the appellant commenced his term of service on the first of January preceding, though there was evidence tending to show that the respondent's superintendent had promised, upon appellant's complaining to him, to have it repaired as soon as he completed a contract they were then working upon, but did not. He subsequently, when appellant again complained to him, made another promise to remedy the defect.

The jury returned a verdict in favor of the respondent, upon which the judgment appealed from was entered. The grounds of error specified in the notice of appeal upon which the appellant relies in this court are the following: That the court erred in sustaining the respondent's objection to questions asked upon cross-examination by appellant's counsel to one T. C. Miller, a witness for the respond-

ent, as follows: "Who, if any one, served the subpœna upon you? State whether or not your fees were tendered you at the time the subpœna was served upon you? State what distance you came to attend as a witness in this case?" And in the court's saying in connection therewith, in the presence of the jury, "that the jury would not be justified in drawing any inference therefrom, even if the witness were shown to have attended without any subpœna being served upon him at all." Also in limiting the counsel for the appellant to an hour and a half in which to sum up the case to the jury. And in the court's giving certain instructions to the jury which will hereafter be noticed.

The case has been very thoronghly and ably presented upon both sides. The counsel for the appellant by his brief and argument has shown that he has investigated every phase of it with the closest scrutiny. Yet, after a full consideration of every question, I am inclined to the opinion, that his points are not well taken. The real issue between the parties was one of fact, and the court ought not to disturb the finding of the jury unless it is clearly shown that error was committed at the trial.

The first ground of error cannot possibly be maintained, whether the witness, T. C. Miller, was subpœnaed by the party or by an officer, or was not formally subpœnaed at all, was of no importance, nor whether any fees were tendered to him, nor the distance he came to attend as a witness. If he had come voluntarily in order to be a witness in the case it might have shown a feeling of friendship for the party who called him, but that question was not asked him, and those that were asked him were entirely too remote to elicit any material fact. Suppose he had answered the question by saying "that no subpœna had been served upon him," "that the respondent had represented him to attend, and that he consented to do so;" "that he had waived the formal service of subpœna." What possible discredit could it have cast upon his testimony? And the same inquiry may be made if he had answered that no fees were tendered him. I think the court concluded rightly "that the jury would not be justified in drawing any inference therefrom, even if the witness were shown to have attended without any subpœna being served upon him at all," and it might have added "without having required the prepayment of his fees."

The second ground of error, the limiting of the appellant's counsel to one hour and thirty minutes in which to argue the case to the jury, I believed to be more serious, as I had always entertained the view that the statute gave two hours on a side in such cases. It reads as follows: "Not more than two counsels on a side shall be allowed to address the jury on behalf of the plaintiff or defendant; and the whole time occupied on either side shall not exceed two hours unless the court, for special reasons, shall otherwise permit:" Sec. 194, sub. 4, civil code. But a careful observance of the language will show, I think, that the legislature did not intend to grant any definite time in which counsel might address the jury. It merely pro-

vided that the whole time occupied for that purpose, should not exceed two hours on a side; and left in the court the power to permit, for special reasons, a longer time. The provision was a restriction upon the power of the court; it cannot permit any more time to be occupied than that unless for special reasons. Courts at common law had the right to limit the time counsel should occupy in addressing the jury, and the statute confers the same right. It is included in the authority, "to control in furtherance of justice, the conduct of its ministerial officers and all other persons in any manner connected with a judicial proceeding before it, in every matter appertaining thereto:" Sec. 884, sub. 5, civil code. The legislature, by the former section, limits the said time to two hours on a side, leaving in the court the right to extend it for good reasons, but it has not restricted the power of the court from limiting it still more. It has not interfered with the power of the court, except as before stated. The latter may allow counsel to occupy two hours on a side for the purpose mentioned, but it has no authority to permit them to occupy a longer time unless there are good reasons for so doing. Its power so far is restricted, but in no other particular. A trial might, and often does, take such a course that only a single question of fact is left for the consideration of the jury, and that may involve the credibility of but one witness; in such case it would require a great amount of patience upon the part of a *nisi prius* judge to be compelled to sit four hours and listen to the harangue of a garrulous counsel.

It was contended by the appellant's counsel that, irrespective of the statute, the circuit court, in view of the importance of the case, extent of the testimony, its contradictory character, and of the intricate points of law involved in it, abused its discretion in limiting the time as it did herein. However that may have been, as a matter of fact, it does not appear with sufficient certainty to justify our interference with the judgment; though I would be much more satisfied with the proceeding, if the court had allowed counsel two hours upon a side, yet I must concede that the presiding judge had the better opportunity to determine that matter.

The third assignment of error involves the correctness of the fifth and eighth instruction given by the circuit court to the jury. The following is a copy of the said instructions respectively: "Fifth. If you believe from the evidence that the plaintiff knew the position, condition and character of the machinery by which he was injured, and could have reasonably avoided danger by approaching the same from the outward revolutions of the gear, and did not do so because he did not think to look, then he was guilty of negligence precluding his recovery, and your verdict must be for the defendant."

"Eighth. It was the duty of plaintiff when approaching machinery about which he was employed, both to think and look in order to avoid injury from such machinery, and if you find from the evidence that the injury sustained by the plaintiff was received by reason of his failure to think or look as to what he was doing, he was guilty of

such negligence as precludes his recovery, and your verdict should be for the defendant."

The complaint against these instructions is, that they were given without qualification; that the circumstances under which the appellant was situated at the time he approached the machinery to ascertain whether any of the shafts were heating; his inexperience, the machinery having been previously heating, the smell of burning oil, and the necessity of haste, were disregarded; that the evidence showed an emergency had arisen and the court did not allow the jury to consider it; that it, in effect, took these circumstances from the jury. But it must be remembered that the evidence upon that point was conflicting, that there was evidence upon the side of the respondent which tended to show that the machinery in all respects was in good condition, and ordinarily safe; that the key did not project, and that it would not be dangerous if it did; that it was customary to permit such keys to project; that the general condition of the machinery was good; that the appellant should have approached the particular gearing from the other side, and that there was nothing to prevent him from so doing; that the appellant had made different statements in relation to the shaft after he got hurt, and, at some five or six different times, had told different persons that the accident was caused by his own carelessness, and that it would not have occurred if he had not been in such a hurry to get away, so as to have a few hours to himself, and his being in a hurry and thinking about something else, at the time. It was doubtless in view of all the testimony, that said instructions were given. The court did not assume, and it had no right to assume, the correctness of the testimony on either side. If that adduced by the appellant had been conceded to be true, there would, from the appellant's standpoint, have been more ground for complaint.

It cannot be maintained that the instructions were erroneous as abstract propositions. The fifth one is to the effect, that if the appellant knew the position, condition and character of the machinery by which he was injured, and could have reasonably avoided danger by approaching the same from the outward revolutions of the gear, and did not do so because he did not think or look, he was guilty of such a degree of negligence as to preclude his recovery. I think that is clearly maintainable as a correct proposition of law. The eighth one is to the effect that it was the duty of the appellant when approaching machinery about which he was employed, both "to think and look" in order to avoid injury from such machinery, and if he received the injury by reason of his failure to "think or look" as to what he was doing, he was guilty of such negligence as precluded his recovery. That is also as it appears to me, a correct proposition of law, nor do I understand that the appellant's counsel controverts either of these conclusions, but he contends that under the peculiar circumstances of this case, they are incorrect, because, he says, the evidence shows that the state of affairs before mentioned existed. He cannot, however, maintain that the evidence adduced by the

appellant may, and doubtless did, tend to show it, but the evidence of the respondent showed quite to the contrary.

It may be claimed that the court, admitting the correctness of the counsel's position, should have charged, that if the facts were as the appellant claimed, that the appellant did not "think or look" in consequence of the exigency of the case and the flurried condition of mind he was in, occasioned thereby, his failure to "think and look" would not be such negligence as would necessarily preclude his recovery, or, in other words, that the jury should take such facts and circumstances into consideration in determining whether the appellant was guilty of negligence or not. But the court was not asked to charge that, nor was the charge it gave necessarily inconsistent therewith, and the instructions referred to were not in and of themselves erroneous. If, therefore, the appellant's counsel is correct in his position regarding the law, in such a case, it does not follow that the court committed error as alleged. This view of the case did not probably occur to the mind of the court. In the hurry and confusion attending a jury trial, the presiding judge cannot be expected to instruct in regard to every view in which the facts of a case may be considered, without having his attention directed to it. His neglect in that particular should not therefore be held to be error where his attention was not directly called to the matter by an appropriate prayer for instructions. It is unnecessary to speculate upon the consequences that would have followed if such an instruction upon the point under consideration had been asked and refused. I am inclined to believe, however, that if the facts were as the appellant claimed, in regard to the condition of the mill and machinery, and that the other circumstances existed when the injury was received, the question of appellant's negligence should have been submitted to the jury, and been determined in view of those facts and circumstances. Whether a person in a certain affair has acted carelessly and imprudently or not, depends very much upon the condition in which he is placed. The same prudence and deliberation would not be expected from him in case a house was on fire as would be in ordinary occurances. But the view we have taken of this matter renders it unnecessary to express any opinion upon that point. It is sufficient to determine that the two instructions considered were not erroneous as given, whatever might have been the case if prefaced as before suggested.

This court, in Stone v. Oregon City Manuf. Co., 4 Or., 52, held that the refusal of an instruction, similar in terms to the said two instructions, was error, and reversed the judgment. The court there said "that there is very little machinery in a woolen mill but what is dangerous to careless and thoughtless operatives; consequently, we hold that it was the duty of respondent, while engaged in working in the vicinity of such machinery, to exercise his thinking faculties, and give careful attention to the business in which he was engaged. If he failed to do so, and was injured in consequence thereof, it was such negligence as contributed to his own injury, and

would prevent his recovery in the action." This I believe to be the general rule in such cases, and it is decisive of the present question. If the facts and circumstances surrounding the affair in which the party received the injury were such as to excuse him from that degree of care and thoughtfulness a prudent man would ordinarily exercise, they should, I think, be taken into consideration by the jury in determining the question of the party's negligence; but where, as in this case, such facts and circumstances are controverted, and the court fail to call the attention of the jury to them, the counsel for the party should so frame the instruction desired as to secure their benefit in case they are found to exist. The true test as to whether the party is chargeable with negligence in such a case is, whether the act is such that a man of ordinary prudence would not have done it under all the circumstances.

The fourth and last ground of error this court is required to consider is the correctness of the seventh instruction given to the jury. The following is a copy of the said instruction:

"7. It is a general principle that a person cannot recover for an injury occasioned by the negligence of another, unless he himself is without negligence contributing to the injury of which he complains. If, therefore, you find from the evidence that the negligence, carelessness, or want of care, on the part of plaintiff, contributed to the injury of which he complains, he cannot recover in this action, and your verdict must be for the defendant."

The appellant's counsel contends that the instruction is incorrect, in not specifying the degree of negligence that must contribute to the injury, to prevent a recovery; that there are three degrees of negligence—slight, ordinary and gross; and that a party may contribute slight negligence to the injury, and still recover on account of the negligence of the adverse party.

The instruction was evidently intended only to lay down the ordinary rule upon the subject, and the language employed is the same that is commonly used in stating the general principle which governs in such cases. The jury could not possibly have been misled in consequence of any omission in the particular mentioned, even if it were necessary to make the distinction, as the next following instruction fully explained the degree of negligence required to be shown in order to defeat a recovery in the action. By the eighth instruction the jury were told as follows: "If you find from the evidence that the injury in question was caused by some negligence upon the part of the defendant, amounting to want of ordinary care, and that the plaintiff himself exercised ordinary care in the matter, then it would be no defense that the plaintiff might have avoided the injury by the utmost possible care. Extraordinary care on the part of the plainliff is not required, and its absence would not excuse the defendant."

This fully served to explain the previous instruction in the respect mentioned, and it is idle to contend that the jury could have been misled upon the point. Besides, I do not concede that

a party can recover in such a case when chargeable with any degree of negligence upon his part if it directly contributes to the injury. A person may be negligent in an affair and still recover on account of the negligence of another party, but not when his negligence is the proximate cause of the injury. The law does not enforce contribution between joint tort feasors. However slight the negligence upon the part of a plaintiff may be, if it be such that but for that negligence the misfortune could not have happened he cannot recover, but if the injury would have happened if his want of care had not contributed thereto, there may be a liability.

I am inclined to the belief that said instruction is correct without any explanation. Affirmed.

JUDGE WALDO did not sit in this case.

ADAMS, ADMINISTRATRIX, ETC., *v.* RUTHERFORD ET AL.

Filed December 3, 1885.

PROMISSORY NOTE—STIPULATION FOR FORFEITURE OF CREDIT—MISCONDUCT OF PAYOR—PAYMENT OF INTEREST.—The defendant executed to the plaintiff's testator a promissory note, payable at Salem, in the county of Marion. The note provided that the interest should be paid annually, and in the event of its not being paid when it became due, that the principal and interest should become due and payable at the option of the holder. Subsequently the plaintiff removed to Portland, and resided there when the annual interest fell due. Several days prior to the date when the interest fell due, the defendant wrote to her inquiring to whom he should pay the interest at Salem, or, if she preferred, he would send a check for the amount. To this letter she did not reply, nor did she come to Salem to receive the interest, or designate any person or bank to receive it for her. The defendant was at Salem, ready and willing to pay the interest, but did not make a payment of it into any bank. *Held*, that the conduct of the plaintiff was such as to prevent her from claiming a forfeiture of the credit as to the whole of the note.

APPEAL from the circuit court of Marion county. The opinion states the facts.

C. J. McDougall, for the appellant.

Wm. M. Ramsey, for the respondent.

THAYER, J. This appeal is from a decree of the circuit court for the county of Marion, rendered in a suit brought by the appellant against the respondents to foreclose a mortgage.

It appears that on the twenty-third day of August, 1883, the respondent, R. H. Rutherford, executed to one Jesse Adams a promissory note of which the following is a copy:

"On or before five years after date, without grace, I promise to pay to the order of Jesse H. Adams at Salem, Oregon, twenty-three (2300) hundred dollars in gold coin of the United States of America, of the present standard value, with interest thereon in like gold coin at the rate of eight per cent per annum from date until paid, for value received. Interest to be paid annually, and if not so paid the whole sum, both principal and interest, to become immediately due and collectible at the option of the holder of this note, and in

case suit or action is instituted to collect this note or any portion thereof, I promise and agree to pay in addition to the costs and disbursements provided by statute, such additional sum in like gold coin as the court may adjudge reasonable for attorneys fees to be allowed in said suit or action.

(Signed.) "R. H. RUTHERFORD."

That in order to secure the payment of the said note, said respondents at the same time executed to the said Jesse H. Adams, a mortgage upon certain real property situated in the said county of Marion; that after the execution of said note and mortgage, the said Jesse H. Adams died, and the said respondent, Sila M. Adams, was duly appointed his administratrix with the will annexed. It is alleged in the complaint that the respondents failed to pay the installment of interest which fell due on the twenty-third day of August, 1884, and that, consequently, the whole sum of principal and interest became due by the terms of the note, and the suit was instituted to enforce payment of the entire demand.

The respondents in their answer alleged that when the note was made both payee and maker resided in the county of Marion, but that the appellant then and for more than four months past had resided in Multnomah county, and that said note had during such time been in said last mentioned county, and had not at any time during said period, been in Salem, or to be found there; that the respondent had not presented said note to the maker for payment at any time, at Salem or elsewhere, or demanded payment of said interest; that on said twenty-third day of August, 1884, the said maker was, and ever since had been able, ready and willing, to pay to the holder, the said interest, and that he had in Salem, when said interest became due, sufficient funds to pay it, and was then willing and tendered the amount and brought it into court and deposited it for the appellant.

These several allegations, excepting place of residence of the appellant, were denied in a reply filed on behalf of the appellant, and which constituted the main issues tried. Evidence was taken in the case from which the circuit court found that said installment of interest had been tendered, and the amount having been paid into court, decreed that it be applied to the payment thereof and that the appellant pay the costs of the suit.

I have examined the evidence and am satisfied that the respondent, R. H. Rutherford, intended to pay such interest at its maturity. The appellant had been, before it accrued, negotiating with him to pay the whole claim. About the day it fell due the said respondent transmitted to her a check drawn by the O. & C. R. R. Co. on Ladd & Tilton, which he had obtained, amounting to ninety-four dollars and fifty cents, and two or three days thereafter sent her a draft on Allen & Lewis for one hundred and twenty-five dollars; that several days before the said twenty-third day of August, he wrote her inquiring as to whom he should pay said interest; that he made arrangements with a banking house at Salem by which

he might draw on it for funds. Subsequently to sending the check to appellant, of ninety-four dollars and fifty cents, he received a letter from Messrs. McDougal and Bower, appellant's attorneys, bearing date August 26, 1884, in which the same was enclosed, and which stated in effect that the appellant would not receive it, as it was not the whole amount; the said draft was also subsequently returned. Thereupon he sent the balance due on said interest by express in the care of Messrs. McDougal and Bower; that afterwards the summons in the suit was served upon him, and he then sent his brother down to pay it, but appellant would not receive the amount. It is unnecessary to review the evidence further.

There can be no question in my mind, but that said respondent used all reasonable efforts to pay said interest, still I do not think they strictly or technically amounted to a tender. I understand the rule in such cases to be that the payor of a note must be at the place of payment at the time it matures, ready and willing to pay the same, and that he should either deposit the amount of money due, in some bank or other place to be paid, or keep it intact, and, in either case, if suit be commenced, carry it into court and deposit it there when he files his answer. These very nice requirements of the law upon the subject of tender were not observed by the said respondent in this case, neither was the appellant at Salem on said twenty-third day of August, 1884, to receive said interest, nor had she designated any person to whom it could have been paid. The result is that, as a matter of strict law, she was entitled to a decree for the payment of the amount of said interest, and to have the mortgaged property sold and the proceeds applied for that purpose.

The appellant's counsel further claim that, as a sequence, the entire debt became due and that the appellant is entitled to a decree for the full amount in accordance with the clause in said note which provides, that the interest shall be paid annually, "and if not so paid the whole sum, both principal and interest, to become immediately due and collectible at the option of the holder of the note." But I do not think they can maintain that position. I am of the opinion that such a clause in a note must be construed independently of the rules established by the law merchant. It must stand upon its own basis. It is a stipulation grafting upon the note another genus. Under the *lex mercatoria*, as expounded by the American courts, we may be compelled to conclude that the appellant need not aver or prove that she performed upon her part the acts by which payment of said interest could have been made, in order to maintain her suit, but it does not follow that she is relieved from averring and proving such performance in order to obtain the benefit of a provision foreign to that code. The stipulation ought not to be rendered effectual except in accordance with the principles of the general law of contracts. In that view of the matter the appellant should not be heard to complain of the said respondent's not being present at Salem on the day the interest fell

due ready to pay it, unless she was there ready to receive it, or had designated some party to whom he might pay it. He had, about a week before the time, written the appellant to know how or where he should pay the interest, and fair dealing required that she should have answered that letter. His going to Salem upon the day the payment was to be made, and remaining there ready and willing to pay the interest, might have answered the technical requirements of the law; but practically it would have been an idle affair. It would have been of no benefit to the appellant. He could not have paid the money to any one, and if he had deposited it there it would have been of no advantage to the appellant whatever. She apparently did not want him to pay the interest, was anxious that the time in which he was to pay it by the terms of the note, should run past. And it appears to me that she is endeavoring by means of a mere technical rule, to perpetrate what might be a great hardship and wrong upon the respondents. The money was sent to her before she began her suit, and what more could she have honestly desired? Time was not of the essence of the contract, the stipulation could only have been intended for the purpose of saving the holder of the security the necessity of commencing a number of suits to obtain satisfaction of the debt, and was not expected to become operative unless the payor utterly failed to make the payment. It could not have been designed as "a trap for the unwary," and the attempt to take advantage of it in the manner in which the appellant is endeavoring to, under the circumstances disclosed by the evidence, is unconscionable, and if a court of equity were to aid in carrying out a scheme that would enable one party to gain an undue advantage over another it would abuse the important mission entrusted to it. It may seem very absurd to determine that for one purpose a note has not been paid, and for another that the holder cannot claim a default upon the part of the maker by reason of a non-performance on his part, but the parties to the note have occasioned the seeming inconsistency by inserting in it a stipulation of a dissimilar nature.

A promissory note is a written promise to pay a sum of money, at a certain definite time. The stipulation is to the effect that, in a certain event, a sum of money shall become payable, otherwise not. The instrument combines two heterogeneous features, one of which must be interpreted by the law merchant, and the other by the ordinary law of contracts. In the latter case the party who claims a breach must show performance upon his part. The clause referred to is, no doubt, lawful, and the view here taken may appear subtile, but it is fair and proper to counteract a technical claim that would work injustice by the employment of technicality. I concede that the construing of the different parts of the same instrument by different systems of law is the getting down very much to a nicety, but when parties jumble up their transactions by blending elements of a different character, refined discriminations have to be resorted to, especially when the matter comes before a court of equity, a trib-

unal that can never consistently with the object and purpose for which it was established assist in the perpetration of a wrong.

I am of the opinion that, upon general equitable principles, the appellant should not be allowed the relief she claims. Equity never enforces a penalty or forfeiture, nor the specific performance of a contract, except to subserve the ends of justice. The appellant has not done equity in the affair, and is endeavoring to secure an unjust advantage. I think the appellant should have a decree for said amount of interest, with costs and disbursements up to the time the money was brought into court, and that the same be applied upon said interest and the said costs and disbursements allowed as above, and that the respondents pay any deficiency that may remain, and that, in default of such payment, the appellant have leave to enforce it by execution and sale of said mortgaged premises, and that each party pay one-half of the disbursements upon appeal to this court, and the decree appealed from be modified in accordance with the principles of this decision.

LORD, J., CONCURRING. In concurring in the opinion of my associate for the affirmance of the decree in this suit, I have deemed the questions involved of such importance to the business interests of the community as to require a statement of the grounds upon which my opinion is founded.

It is an elementary principle that a court of equity has no power to make or alter the contracts of parties, but, ordinarily, its duties are, when invoked, to enforce them as made. Nor is the mere fact that the bargain is hard, or even unreasonable, sufficient of itself, to induce the court to interfere. But there must be connected with the contract some element or matter of equitable jurisdiction, such as fraud, mistake, duress, undue advantage, or the like, either inhering in the contract, or growing out of the age, relation, condition or circumstances of one of the contracting parties which probes the conscience of the chancellor, and invokes the protecting jurisdiction of equity. More than a century ago, Lord Chancellor Hardwicke said: "It is not sufficient to set aside an agreement in this court to suggest weakness and indiscretion in one of the parties who has engaged in it; for, supposing it to be in fact a very hard and unconscionable bargain, if a person will enter it with his eyes open, equity will not relieve him upon this footing only, unless he can show fraud in the party contracting with him, or some undue means made use of to draw him into such an agreement:" Willis v. Jarnegan, Atk. R., 251.

There may, possibly, be contracts, not infected with fraud or imposition, which are so grossly unreasonable and oppressive, that in view of all the circumstances a court of equity may be induced to interfere and grant relief, but as Judge Story says, the court in such case is "certainly very cautious of interfering" and only "upon very strong circumstances" and only then, it would seem, where some undue advantage is sought to be taken of some strict rule of

law: Story Eq. Jr., sec. 331. It may, therefore, be said that when a contract has been entered into which is legally binding upon the parties, and a breach or default in any of its terms occurs, equity will not interfere and relieve the party in default of the performance of his promise or engagement unless he can offer some good excuse, such as fraud, or misconduct in the other party, or accident, mistake and the like.

Turning now to the contract under consideration, can it be said that the stipulation complained of is not legal, or that it imposes any inequitable obligation? In effect, it simply provides that the interest shall be paid at stated periods of time, and in case of default in the payment of such as agreed, the creditor may insist upon the payment of his whole debt at his option. This is but an absolute promise of the debtor or obligor to pay the interest when due, coupled with the condition that failing in this, he will be, at once, bound, at the option of the creditor, to pay the whole debt, all of which in fact he owes, and upon the faith of which promise and its performance the creditor parted with his money or property. Whether the credit shall be for the whole period or shorter, is made to depend upon the promptness with which the borrower pays the interest according to his agreement. Time is made the essence of the contract, and, although the general rule is that equity will not regard time in the performance of contracts, yet, if the parties have seen fit to make it the essence of their agreement, equity will not interfere to aid the party in default, unless he can offer some good excuse, recognized in equity, for such default. Nor is there any hardship in making the contract so. By such a stipulation, the party, desiring to borrow, is often enabled to secure a larger loan than he otherwise could upon the property or other security, or to purchase property and contract for its payment upon more advantageous terms. To relieve him of his engagement, when a benefit has thus been obtained, upon the faith of his promise, and allow the interest to accumulate, the result might, in many cases, be to swell the dimensions of the debt beyond the value of the security or his ability to pay when the last day of grace had come. It might thus work, in some cases, a positive disadvantage and inequity to both parties, to one the sacrifice or loss of his property and to the other the loss of part, at least, of his debt. A catastrophe which, perhaps, might have been averted by a strict performance of the contract, and which, we may suppose, the calculations of the parties were designed to prevent when the contract was made. To my mind there is nothing in such a contract which is inequitable, unreasonable or oppressive. If the party suffers in consequence of his own default, it is the penalty of his own negligence, and of which he has no right to complain in a court of equity, for, certainly, it furnishes no ground for such court to intervene and relieve him from the payment of the interest according to the conditions of his own agreement, unless his default occurred in consequence of some act of the other party, designed to mislead him and to prevent the payment of the interest at

the time appointed by the contract, or by reason of accident or mistake.

In Noyes v. Clark, 7 Paige's Ch., 179, the chancellor says: "The parties had the unquestioned right to make the extension of credit dependent upon the punctual payment of the interest at the time fixed for that purpose. And if, from the mere negligence of the mortgagor in performing his contract, he suffers the whole debt to become due and payable, according to the terms of the mortgage, no court will interfere to relieve him from the payment thereof according to the conditions of his own agreement:" Steele v. Bradfield, 4 Taunt., 227; James v. Thomas, 5 Barn. & Adolp., 40. The authorities to this point are numerous and unanimous: Ferris v. Ferris, 28 Barb., 31; Valentine v. Van Wagner, 37 Barb., 60; Reubens v. Prindle, 44 Barb., 336; Bunnel v. Stevenson, 53 N. Y., 508; Martin v. Melville, 3 Stock., 222; Wilson v. Bird, 28 N. J. Eq., 352; DeGroot v. McCotter, 19 N. J. Eq., 532; Cassidy v. Calvin, 47 Iowa, 22; Heath v. Hall, 60 Ill., 344; Terry v. Trustees Eureka College, 70 Ill., 236; Leonard v. Tyler, 60 Cal., 299; Stancleft v. Norton, 11 Kan., 223; Crane v. Ward, Clarke's Ch., 393. In the last case named this language is used: "The entire amount cannot be altered by any construction which may be given to the contract. The time of payment only is contingent. The parties to the original contract have unquestionably a right to agree that if the interest upon the money is not paid punctually the principal shall become due. So they might make any event the criterion of time when the principal was to be paid."

Nor does it make any difference whether the stipulation is contained in the note or mortgage; for the rule is well settled where several instruments are executed together as parts of the same transaction, they are all to be considered in determining what the agreement was: Schoonmaker v. Taylor, 14 Wis., 342.

Nor is such an agreement in the nature of a penalty or forfeiture as contended, and against which equity by reason thereof will not enforce its terms. To this objection Ingram, J., in Ferris v. Ferris, *supra*, has aptly replied: "It is urged that there is a forfeiture, and equity will always relieve a party against it. But it is a mistake to say that there is any forfeiture. The plaintiff's claim is for money, secured by the bond, and interest; there is nothing more claimed; the debtor owes the amount; he forfeits nothing; he is required to pay nothing but his debt; there is no forfeiture to be relieved. If the bond had been conditioned to pay the money in one year, with an agreement to extend the payment a second year if the interest was paid, within thirty days after it became due, no one for a moment would argue that there was any forfeiture. And yet that condition and the condition in the bond are substantially the same. Nor can it be called a penalty, that is, a sum named as damages, to be recovered for violating an agreement or promise in lieu of damages. There is no such thing here. No damages are called for. Merely altering the day of payment is neither a forfeit-

ure of any property, nor a penalty in damages for the breach of any agreement."

It is plain, then, that such contracts are regarded as valid, and will be enforced in equity, according to their terms, when a default occurs. But there must be a default, which, as Lush, J., says, "imports something wrongful; the omission to do something which, as between the parties, ought to have been done by one of them." And the omission to pay on the day specified will be such a default as will enforce a forfeiture of the time of the credit, unless it was occasioned by the acts or declarations of the holder of the mortgage, or the mortgagor can show some good excuse for it, such as mistake, or accident, or fraud. He who comes into equity must come with skirts clean and free from blame, for, if the complainant who seeks to enforce the forfeiture of the time of credit is not free from fault, or guilty of conduct calculated to mislead the mortgagor, and designed to prevent the payment of the interest on the day specified, the court will refuse to enforce the forfeiture of the time of credit.

In Noyes v. Clarke, *supra*, it was held that where a creditor keeps out of the way to prevent a tender of the amount due him, a suit commenced by such creditor for the recovery of the debt will be stayed, upon payment of the amount due, without costs, although a technical right of action existed at the commencement of the suit. The chancellor says: "A court of equity, however, will not permit the mortgagee, or his assignee, to take an unconscientious advantage of the mortgagor who is willing to pay at the time prescribed, but who is unable to do so in consequence of the act of the other party, especially where there is reason to believe the default in payment was the result of a mere trick to defraud the mortgagor of his rights, by depriving him of the power of making the payment at the time prescribed. In this case it is evident that the defendant Clark was both ready and willing to pay the interest on his bond and mortgage on the day it became due. And if the assignee did not intentionally deprive him of the power of doing so, by keeping out of the way and concealing his place of residence, he transacted the business of the assignment in such an unusual manner as to produce the same result."

In De Groot v. McCotter, *supra*, it was held that the court will not enforce a forfeiture of the credit if the complainant himself is in fault, or has misled the defendant. In this case there was a parol agreement as to the place of payment, and the complainant promised to call at this place, but declined to give the number and street of his residence. Afterwards, upon suit brought by the complainant, the defendant claimed there was no default under the circumstances, as the complainant failed to call at the place appointed, etc. And in the course of opinion, Dalyrimple, J., says: "I think it, therefore, fair to say that the complainant, by his own conduct, prevented a strict tender. He is here asking the enforcement of a forfeiture according to the letter of the bond. We can-

not grant his prayer, because it does not appear that he is without fault. It is not necessary to consider whether, as insisted by the defendant, the complainant acted in bad faith, or from a mere mistaken notion of his legal right. In either event, the result was the same—to mislead the defendant." See, also, Wilson v. Bird, *supra*.

These references are sufficient to show the principle upon which courts of equity will interfere and relieve the defendant from the forfeiture of the time of the credit.

Now, passing to the facts, what is the state of the case as disclosed by the evidence? At the time the note and mortgage were executed, both parties resided in this county, and the place of payment was at Salem. Subsequently, the complainant removed to Portland, and resided there when the installment of interest fell due. The evidence shows that the complainant was extremely anxious to secure the payment of the whole debt, and endeavored to bring about some negotiation to effect that purpose. Now, it is clear to my mind, failing in this as she did, that she was determined to take advantage of any circumstance and to entrap the defendant in any way she could, so as to claim a default, and enforce the forfeiture of the credit. Several days prior to the date when the interest fell due, the defendant wrote to her inquiring to whom he should pay the interest at Salem, or, if she would prefer it, that he would send her a check for the amount. In doing this, he was simply seeking honestly to keep the performance of his contract, and at the same time, if she preferred it, to save her the trouble and expense of coming to Salem. It was an easy matter for her to have answered his letter, either stating she would be there and where, or designating some person or bank to receive it, or authorizing him to send his check, as might be her pleasure. Honesty and fair dealing required that letter to be answered, but she did not do it, but purposely and advisedly refrained from answering, to produce the result which followed. She neither came to Salem nor designated any person or bank to receive it for her. More, she did not intend to do either. It would not do for the defendant to incur the risk of going to Portland, for that was not the place of payment, and to do that from his place of residence in the county, by the most rapid means of locomotion, he could not return before late in the evening, when, practically, he would have been in default. The defendant did the only thing he safely could do—come to the place appointed by the contract for the payment of the interest. It is not questioned but what he had the money, or that his credit at the bank was not such that the payment could have been effected at any moment; nor that he was not at the proper place, ready and willing to meet his engagement. But the complainant was not there either in person or by proxy, and designedly so. The object, manifestly, was to lead him to suppose that the complainant would be there, when the purpose was to remain away, and thus keep him in waiting until the hour for the last train should have passed, when, practically, he would be in default, or the hour would be too late to arrange for a deposit of the

money. There was in this conduct, and in that which preceded it, viewed in the light of all the circumstances, a manifest intention to mislead him.

To my mind, there is no difference in such cases from the cases already referred to, where the party kept out of the way, or concealed the place of his residence to deprive the mortgagor of the power of making the payment at the time prescribed. He was not shirking his obligation, but honestly trying to perform it, and only prevented from doing it by artifice. In such case, there was not a default in the sense of a wrongful omission to do what had been contracted to be done, for the result produced originated in the misconduct of the complainant, and for the consequences of which the defendant ought not to be made to suffer. This was not a contract which by its terms made the failure to pay the interest at the day specified, work a forfeiture of the credit as to the whole debt absolutely, as in many of the cases, but only at the option of the complainant, a circumstance which is to be considered in connection with the case in the light of all the evidence and the conduct of the defendant immediately afterwards in sending checks for the interest.

WALDO, C. J., DISSENTING. This may be stated to be a contract, substantially, to pay money at a day certain, with a condition to pay at an earlier day if the debtor shall fail to do a certain act. The plaintiff alleges the happening of the contingency on which the money was to be paid at the earlier day, and claims the payment provided for in that case by the contract. The case turns on the happening or not happening of the contingency, or, is the debt in default? If so, the case is at an end.

The parties have expressly agreed that on a certain contingency, payment shall be made at the earlier day. The contingency relates only to the day of payment. In either case there is a debt to pay and the payment is the payment of a debt and not of a penalty. Thus in Stearns v. Beck, 1 DeG. J. & S., 11 W. R., 591, where a mortgage provided for the payment of sums by installments and contained a stipulation for the payment of the whole sum in default of payment of any such installment, it was held by the Lords Justices, reversing the judgment of St. John Stuart, V. C., that such provision was binding, and was not in the nature of a penalty: Peachy v. Somerset, 2 W. & T., L. cases, star p., 1097, N. Acc.; Crane v. Ward, Clarke Ch., 393; People v. Superior Court, 19 Wend., 104, Coalter, J.; Mayo v. Judah, 5 Munf., 500; Basse v. Gallegger, 7 Wis., 442. There is no room in such a case for a court of equity to put an equitable construction upon the contract, and thereby make it other than what the parties themselves have expressly made it. Branwell, B., in Preston v. Dania, L. R. 8 Ex., 20, is of opinion that equitable interference with the agreement of parties has already been carried beyond sound principle.

Now, the plaintiff was, on the day of payment, and long prior thereto, a resident of Portland, and this fact was known to the de-

fendant. Therefore either of two courses was open to him to avoid a default: 1. To be ready with the money at Salem to pay at the day; or, 2. To tender payment at the day to the plaintiff in Portland. He did neither. There seems to have been nothing to prevent him doing the one or the other. A default is the inevitable result. A few days before the money was to fall due the defendant wrote a letter to the plaintiff at Portland inquiring where he should make payment. There is no evidence that the letter was received, but on the contrary, there is evidence that it was not, for the defendant testifies that the letter was returned to him through the postoffice as he supposed, by the post master at Portland, in pursuance of a direction on the envelope in case of nondelivery. If it had been received and remained unanswered it would have amounted to nothing, for the law gave the defendant directions what to do. The plaintiff was under no legal obligation to be at Salem to receive the money. If the defendant had been there with the money ready to pay, it would have been equivalent to a tender and prevented a default. But he was not there, and as to other steps open to him, the case stands as if there had been no place of payment named in the note. It was defendant's duty in that case to seek the plaintiff at Portland and to tender her the money. Thus, in Cheney's case, 3 Leon., 260, the law is stated to be that if, "A. is bound to deliver ten bushels of wheat and no place is limited where the payment shall be made, the obligor is not bound to seek the other party wheresoever, as in the case of payment of money, for the importableness of it shall excuse him." In Crosby v. Hillary, 2 M. & S., 122, Dampier, J., said: "It is laid down by Littleton that the obligor of a bond conditioned for the payment of money at a particular day, is bound to seek the obligor if he be in England, and at the set day to tender him the money, otherwise he shall forfeit the bond." And see Smith v. Smith, 2 Hill, 351.

"He that pleads an excuse must show that he did all that he could possibly:" Turnor v. Goodwin, Fortescue 150. The defendant did nothing but write the letter above mentioned. The plaintiff did nothing, she remained silent as she had a strict right to do. It is equally certain that the plaintiff was not ready at Salem with his money to pay at the day. Such readiness is considered equivalent to a tender of the sum payable: Hills v. Place, 48 N. Y., 520. He should have had his money at Salem ready to pay at the day if demanded: Fenton v. Goudy, 13 East.; Coldwell v. Cassidy, 8 Cow., 271; Salt Springs National Bank of Syracuse v. Burton, 58 N. Y.

As to cases where a note is payable at a city at large, see Root v. Franklin, 3 John., 208; Covington v. Comstock, 14 Pet., 43.

A tender after the day is insufficient: Hume v. Peploe, 8 East., 168; 2 Pars. Con., 770, n.

In a social point of view the conduct of the plaintiff may not have been commendable, but with that we have nothing to do. "As to the mischief which may ensue by this it matters not, for it might have been prevented by providence of the parties, and the incon-

venience which may happen to them must not alter the law:" Dekins v. Latham, Sty., 317. Lord Mansfield said in Pray v. Eddy, 1 T. R., 314, speaking of a very incommendable defense: "That is a matter for his consideration and not for mine."

I am of opinion that the decree ought to be reversed.

SUPREME COURT OF CALIFORNIA.

No. 11,146.

HOLMES v. WARREN.

Department One. Filed December 19, 1885.

JURISDICTION—SUPREME COURT—APPEAL — JUSTICE'S COURT.—The supreme court has no jurisdiction of an appeal from the superior court, in an action originally brought in the justice's court, for an amount less than three hundred dollars.

APPEAL from a judgment of the superior court of the city and county of San Francisco, entered in favor of the plaintiff. This action was originally brought in a justice's court, to recover the sum of two hundred and eighty dollars and interest. Judgment for the plaintiff was affirmed on appeal to the superior court.

J. C. Bates, for the appellant.

W. H. H. Hart, for the respondent.

BY THE COURT. On the authority of Sanborn v. Contra Costa County, 60 Cal., 425; Derby v. Stevens, 64 Cal., 287; Bailey v. Sloan, 3 West Coast Rep., 295, and cases there cited, the appeal herein is dismissed.

No. 9,273.

GUARDIAN FIRE AND LIFE ASSURANCE CO. v. THOMPSON ET AL.

Department Two. Filed December 21, 1885.

NEW TRIAL—AMENDMENT OF NOTICE OF INTENTION.—Whether the trial court has power to amend a clerical error in a notice of intention to move for a new trial, not decided.

APPEAL from an order of the superior court of the city and county of San Francisco. The opinion states the facts.

Langhorne & Miller, for the appellants.

Chickering & Thomas, for the respondent.

THE COURT. After judgment had been rendered in favor of defendants, plaintiff gave notice of its intention to move the court to vacate and set aside the judgment theretofore rendered, and to grant a new trial. Subsequently, on notice, the plaintiff moved the court

for leave to amend the notice by inserting the word "decision" in place of the word "judgment," on the ground, as stated in affidavits, that the word "judgment" was inadvertently used by a clerk in preparing the notice, the clerk having before him a form containing the word "decision," and by inadvertence wrote the word "judgment" instead thereof. The court granted the leave to amend.

As the case itself is before us on appeal by the party who gave the notice from the judgment and order denying the motion for new trial, on which appeal we this day affirm judgment, it is unnecessary for us to pass on the question of the authority of the court below to amend the notice of motion; because, conceding, for the purposes of this appeal, the court had authority, on the other appeal we hold the court committed no error in the case. The question, therefore, remains but a moot question of no practical importance to either party, and we dismiss the appeal.

No. 9,304.

GUARDIAN FIRE AND LIFE ASSURANCE CO. *v.* THOMPSON ET AL.

Department Two. Filed December 21, 1886.

SURETYSHIP—PRIOR DEFAULT OF AGENT—FAILURE OF PRINCIPAL TO COMMUNICATE DISCHARGES SURETIES.—Sureties on a bond, given to secure the faithful performance of the duties of an agent, are not liable for a subsequent breach thereof, if, before the execution of the bond, the principal knew that the agent was a defaulter to him, and failed to communicate such knowledge to the sureties.

APPEAL from a judgment of the superior court of the city and county of San Francisco, entered in favor of the defendants, and from an order denying the plaintiff a new trial. The opinion states the facts.

Chickering & Thomas, for the appellant.

Langhorne & Miller, for the respondents.

MYRICK, J. The defendant Thompson, as local agent of plaintiff, gave a bond, with his co-defendants as sureties, for the faithful performance of his duties, and for the payment to plaintiff of such sums as he might receive for premiums on insurance. This action is on the bond.

The court below found that for some time previous to the execution of the bond in suit, Thompson acted as agent of plaintiff, and in such capacity defrauded plaintiff of two thousand dollars, premiums collected by him, and that the general agent of plaintiff well knew of such defalcation before the execution of the said bond; and that neither said general agent nor any officer or agent of plaintiff informed the sureties of such defalcation, but on the contrary concealed and suppressed the same from said sureties.

First—The principle of law applicable to the facts of this case is thus stated in Brandt on Suretyship and Guaranty, section 367:

"If the party who takes a bond for the conduct of the principal in an employment, knows at the time that the principal is then a defaulter in said employment, and conceals the fact from the surety, such concealment is a fraud upon the surety, and discharges him. * * * An agent for the sale of coal on commission, who, by agreement was bound to turn over his receipts to his employers, within a specified time, was largely in arrears, and was required by his employers to find security, and a surety became bound for him to the extent of one thousand pounds. The agreement of suretyship recited the terms of dealing between the employer and the agent, but the fact of the indebtedness was concealed from the surety. Held, the surety was discharged, on the ground, that under the circumstances, the recitals in the agreement amounted to an active misrepresentation."

"A person taking a bond for the future good conduct of an agent already in his employment, must communicate to a surety his knowledge of the past criminal misconduct of such agent in the course of such past employment, in order to make such bond binding.

"The mere non-communication of such knowledge, irrespective of motive or design, is a fraud in law, which will invalidate the obligation." Sooy v. State, 39 N. J. L. Rep., 135.

"We think there can be no doubt, either upon principle or authority, that where an agent has acted dishonestly in his employment, the principal, with knowledge of the fact, cannot accept a guaranty for his future honesty from one who is ignorant of the agent's dishonesty, and to whom the agent is held out by the principal as a person worthy of confidence. The failure to communicate such knowledge, under such circumstance, would be a fraud upon the guarantor.

"The bad faith, in withholding from the guarantor such information, so material to the risk assumed, is manifested not only by the fact that the dishonest character of the agent was peculiarly within the knowledge of the principal; but the holding of him out as a person entitled to confidence by continuing him in the service, was equivalent to a declaration that the principal had no knowledge of the dishonesty of the agent:" Dinsmore v. Tidball, 34 Ohio St., 418.

Many other cases, to the same effect, might be cited, but the above are sufficient to illustrate and sustain the principle involved. A few cases to the contrary are presented, but the weight of authority is as above stated.

The judgment is affirmed.

THORNTON, J., and MORRISON, C. J., concurred.

SURETY, WHEN DISCHARGED BY FRAUD OF CREDITOR OR PRINCIPAL.—Smith v. Moberly, 52 Am. Dec., 543; Smyley v. Head, 45 Am. Dec., 750; Bryant v. Crosby, 58 Am. Dec., 767; Wilson v. Green, 60 Am. Dec., 279.

No. 9,023.

KELLEY *v.* KRIESS.

Department Two. Filed December 21, 1885.

JUDGMENT ON PLEADINGS—DEFENDANT MAY HAVE—AMENDMENT OF COMPLAINT.—Where a complaint fails to state facts sufficient to constitute a cause of action, the court may, on motion, give judgment for the defendant on the pleadings. On such motion, if the plaintiff makes application, the court should permit him to amend.

STATUTE OF LIMITATIONS—WAIVER OF DEFENSE.—The defense of the statute of limitations must be taken advantage of by demurrer or answer; otherwise it is waived.

INJUNCTION RESTRAINING EXECUTION—CASE IN JUDGMENT.—The complaint alleged that one Flynn was indebted to the defendant in the sum of four hundred and thirty-seven dollars, for which amount he, and this plaintiff, gave their promissory note to defendant. Plaintiff was in reality but a surety for Flynn, and signed the note without consideration and as an "accommodation surety" for Flynn, all of which was well known to the defendant. Flynn afterward sold certain personal property to defendant, sufficient to pay all of the note except one hundred and thirty-seven dollars, the value of which, Flynn directed and defendant agreed, to indorse upon the note, but did not do so, and credited the same on other demands by him held against Flynn. Upon the maturity of the note, plaintiff urged defendant to bring suit thereon against Flynn who at that time had property sufficient to pay the same. Subsequently defendant brought suit on the note against Flynn and this plaintiff, sued out a writ of attachment and caused the same to levied upon sufficient property of Flynn to satisfy the demand. Plaintiff was served with summons in that cause, and thereupon called upon defendant, who, in a conversation, said he had sued for but did not expect to recover the whole amount of the note; that this plaintiff need give himself no uneasiness about the suit, as the claim was abundantly secured under the attachment, that he, Kriess, would settle the matter with Flynn; that plaintiff need not answer in the cause, and that he did not expect or intend to pursue him, or look to him for any portion of the claim. Plaintiff relied upon these statements, and in consequence thereof, did not answer, and judgment was taken against him and Flynn by default, for the whole amount of the note. After the rendition of the judgment, defendant did not enforce the same against Flynn, but wrongfully and in fraud of the rights of plaintiff, discharged and released his attachment on the property of said Flynn, which would have paid the judgment in full, and ever since has held and still holds the judgment against plaintiff, and threatens to, and unless restrained will, issue execution thereon against the property of plaintiff and enforce the same. *Held*, that the complaint stated facts entitling plaintiff to an injunction against the execution of such judgment.

APPEAL from a judgment of the superior court of San Mateo county, entered in favor of the defendant. The opinion states the facts.

Fox & Ross, for the appellant.

A. Teague and *G. H. Buck*, for the respondent.

SEARLS, C. This is an action to obtain a perpetual injunction, restraining defendant from enforcing a certain judgment held by him against plaintiff.

Upon motion of counsel, defendant herein had judgment in the court below, upon the pleadings, from which plaintiff appeals.

Appellant makes the point that a motion for judgment on the pleadings, by the defendant, cannot be entertained in a case where no affirmative relief is demanded in the answer. That such is not the appropriate method of reaching the objection that the complaint does not state facts sufficient to constitute a cause of action; and cites, among other authorities, to sustain his position, Watson v. S. F. and H. B. R. R. Co., 50 Cal., 524, and De Uprey v. De Uprey, 27 Cal., 330.

We are of opinion the point is not well taken. If a complaint fails to state facts sufficient to constitute a cause of action, advantage may be taken of the defect by demurrer, by motion for judgment on the

pleadings, or upon a motion for new trial. In King v. Montgomery, 50 Cal., 115, it was held that when a cause is called for trial, the action may be dismissed on motion of defendant, if the complaint does not contain a cause of action, and the plaintiff declines to amend.

If plaintiff has a good cause of action, which by accident or mistake he has failed to set out in his complaint, the court, on motion for judgment on the pleadings, should, on his application so to do, permit him to amend, but, failing to make such application, there can be no good reason for proceeding to trial, in a cause where, admitting all the facts charged as true, the plaintiff is still not entitled to a judgment.

A complaint which imperfectly states a cause of action, or which unites two or more causes of action, without stating them separately, or which is ambiguous, unintelligible or uncertain, differs widely from one which utterly fails to show that plaintiff has *any* cause of action. The former presents a case in which it appears the plaintiff has a cause of action, but which is defectively set out, and there, the defect appearing on the face of the complaint, and it appearing that the court has jurisdiction, objection must be taken by demurrer, or it is waived.

It is to this class of cases that the decisions quoted by appellant refer, and not to those in which it cannot be gathered from the face of the complaint that plaintiff has or can have a cause upon which to recover.

2. The only remaining question to be determined is, as to the sufficiency of the complaint.

Respondent claims that as more than three years elapsed between the entry of the judgment against plaintiff and the institution of this action, the cause of action is barred by the statute of limitations, prescribing three years as the limit for actions founded upon fraud.

Under our system of practice, he who would avail himself of the privilege of the statute of limitations, must do so by a demurrer or answer: Grattan v. Wiggins, 23 Cal., 16; Smith v. Hall, 19 Cal., 85; Smith v. Richmond, 19 Cal., 476; Sublett v. Tinney, 9 Cal., 423; Berringer v. Warden, 12 Cal., 311. No such objection having been taken in this cause, it is to be deemed as waived.

It appears from the complaint, the allegations of which, for the purposes of the decision, must be taken as true, that one David Flynn, was indebted to M. Kriess, the defendant in this cause, in the sum of four hundred and thirty-seven dollars, for which amount he, and this plaintiff, gave their promissory note to defendant. Plaintiff was in reality but a surety for Flynn, and signed the note without consideration and as an "accommodation surety" for said Flynn, all of which was well known to the defendant Kriess.

Flynn afterward sold certain personal property to Kriess, sufficient to pay all of the note except one hundred and thirty-seven dollars, the value of which, Flynn directed and Kriess agreed, to indorse upon the note, but did not do so, and credited the same on other

demands by him held against Flynn. Upon the maturity of the note, Kelley urged Kriess to bring suit thereon against Flynn who at that time had property sufficient to pay the same.

The complaint then recites certain efforts made by plaintiff to procure a settlement and adjustment of the note between Kriess and Flynn.

On the eighteenth day of April, 1879, Kriess brought suit in the district court in and for the county of San Mateo, on the note against Flynn and this plaintiff, sued out a writ of attachment and caused the same to be levied upon sufficient property of Flynn to satisfy the demand.

Plaintiff was served with summons in that cause, and thereupon called upon Kriess, who, in a conversation, said he had sued for but did not expect to recover the whole amount of the note; that this plaintiff need give himself no uneasiness about the suit, as the claim was abundantly secured under the attachment; that he, Kriess, would settle the matter with Flynn; that plaintiff need not answer in the cause, and that he did not expect or intend to pursue him, or look to him for any portion of the claim.

Plaintiff relied upon these statements, and in consequence thereof, did not answer, and judgment was taken against him and Flynn by default, for the whole amount of the note.

After the rendition of the judgment, May 21, 1879, Kriess did not enforce the same against Flynn, but, wrongfully, and in fraud of the rights of plaintiff, discharged and released his attachment on the property of said Flynn, which would have paid the judgment in full, and ever since has held, and still holds, the judgment against plaintiff, and threatens to, and, unless restrained, will, issue execution thereon against the property of plaintiff, and enforce the same. That plaintiff having been a surety, he is informed, and believes and avers, the judgment was as against him satisfied and discharged by the security acquired under the attachment.

Plaintiff also avers his readiness and willingness to pay the sum of one hundred and thirty-seven dollars and interest due on said note, but does not aver a tender thereof in direct terms.

It does not appear specifically from the complaint whether the plaintiff signed the note with Flynn as a joint or joint and several maker thereof, or as a surety.

In view of the fact that a pleading is to be construed most strongly against the pleader, and in view of the further fact that appellant, in his brief, speaks of plaintiff as if a maker of the note in question, we may with propriety assume him to be such.

An amendment to the complaint was filed, in which it is sought to be shown that the default of this plaintiff, in the suit upon the promissory note, was entered by the clerk of the court without being directed so to do by plaintiff or his attorney.

It is apparent from the case as presented:

1. That the plaintiff was in reality a surety for Flynn, and that Kriess was well aware of that fact.

2. That, by reason of the payments on account of the promissory note, which Flynn had directed should be endorsed thereon, and which Kriess had agreed to so endorse, but failed to do, there was *pro tanto* a defense to the action on the note.

3. That plaintiff Kelley was prevented from answering and setting up such defense by the declarations of Kriess made to him.

4. That having knowledge of the suretyship of plaintiff, he discharged his attachment lien against the property of Flynn, the principal debtor.

5. That if permitted to satisfy his judgment out of the property of plaintiff herein, he will have an unconscionable advantage over the latter, acquired by his wrongful acts and declarations.

Under these circumstances, it would seem but equitable that plaintiff should have relief.

The contention of respondent is that plaintiff, at the time he was served with summons, was aware of the facts set out in his complaint, and having a plain, speedy and adequate remedy by way of answer in the original action, and for six months after the entry of judgment in said original action, by application to the court for relief under the provisions of section 473 of the code of civil procedure, and that having failed to avail himself of those remedies he cannot call upon a court of equity to protect him against his own neglect.

Proceedings at law will not be restrained, where the party has lost his defense at law, through his own negligence, or has omitted to move for a new trial within the time required by law: Wait's Actions and Defenses, vol. 3, p. 180, and cases cited.

We must assume that plaintiff had notice of all the facts existing before the time to move for a new trial expired, and of which he might have availed himself on such a motion, for the reason, that it is nowhere averred that he was ignorant of such facts. He was bound, therefore, to exhaust his legal remedy, before coming into a court of equity to assert his rights.

As to any relief to which plaintiff may be entitled, and which he could not obtain in the former action, or was prevented from obtaining by fraudulent acts of the defendant, he may obtain in this action, and by injunction if necessary. Injunctions may be "granted to stay trial, or after verdict to stay judgment, or after judgment to stay execution, if the execution has been effected, to stay the money in the hands of the sheriff." Story's Equity Jurisprudence, section 874.

Tested by these rules, we are of opinion the facts as stated in the complaint show, that plaintiff was, by the wrongful acts of defendant, placed in a position from which he could only be relieved by a court having equity jurisdiction, and in an independent action instituted for that purpose.

The action upon the promissory note was pending for a much larger amount than was due. The natural course of plaintiff would have been to defend the action, but he is assured by the defendant that there is no occasion for him to do so, for the reasons:

1. That defendant does not expect to get judgment for more than is due.

2. That he has ample property of Flynn under attachment to satisfy the demand.

3. That defendant did not expect or intend to ever look to plaintiff for any portion of said claim.

Plaintiff relying upon these statements did not answer.

Judgment was taken by the defendant for the full amount of the note, but this did not concern plaintiff particularly, for he knew the property attached was ample to satisfy such judgment.

Then the attachment was released, but *non constat* that defendant was going to violate his promise, not to interfere with or look to plaintiff, and it was not until the threatened writ of execution upon the judgment, in violation of these promises, that his danger became imminent. It was then too late to move in the court, where the former judgment was rendered, for relief. He had been lulled into repose by false promises, and should not suffer by their breach.

We are of opinion that the complaint on its face stated facts sufficient to constitute a cause of action, and that the court below erred in rendering judgment in favor of defendant on the pleadings. For which reasons the judgment should be reversed.

FOOTE, C., and BELCHER, C. C., concurred.

BY THE COURT. For the reasons given in the foregoing opinion the judgment is reversed and cause remanded.

DEFENSE OF STATUTE OF LIMITATIONS MUST BE PLEADED; OTHERWISE IT IS WAIVED.—Union Bank v. Planter's Bank, 31 Am. Dec., 113; Sleeth v. Murphy, 41 Am. Dec., 232; Coles v. Kelsey, 47 Am. Dec., 661; McClenney v. McClenney, 49 Am. Dec., 738. The plea of such defense should be direct and unambiguous: Zeilin v. Rogers, 3 West Coast Rep., 466.

INJUNCTION TO RESTRAIN EXECUTION OR LEGAL PROCEEDINGS, WHEN LIES.—Pollock v. Gilbert, 60 Am. Dec., 732, and cases cited in note; Moch v. Kennedy, 66 Am. Dec., 203; Carlin v. Hudson, 62 Am. Dec., 521, and note.

No. 8,742.

BROWN ET AL. *v.* SENNET ET AL.

In Bank. Filed December 22, 1885.

NEGLIGENCE—MASTER AND SERVANT—FOREMAN NOT A FELLOW-SERVANT.—A foreman, to whom a stevedore commits the entire charge of the business of unloading a vessel, with power to choose his own assistants, and to control and discharge them as freely and fully as the principal himself could, is not a fellow-servant with those employed under him; and if, in the performance of the work, death or injury results to a servant from the wrongful act or negligence of such foreman, the principal is liable, although he exercised due care in the selection of the foreman. In such case the rule exempting the principal from liability for injuries caused by the negligence of a fellow-servant has no application.

APPEAL from a judgment of the superior court of the city and county of San Francisco, entered in favor of the defendants, and from an order denying the plaintiffs a new trial. The opinion states the facts.

George Turner, for the appellants.

Mastick, Belcher & Mastick, for the respondents.

MCKEE, J. The plaintiffs in the action in hand are the widow and children of John Brown, deceased, and they sue the defendant to recover damages for the commission of a wrongful act, or negligence, by him, which, it is alleged, caused the death of the deceased.

The case was tried by the court without a jury. At the conclusion of the evidence given for the plaintiffs there was a motion made for a nonsuit, which was granted, and, afterward, a motion for a new trial, made on a statement of the case, was denied; and from the judgment of nonsuit and the order denying the motion, the plaintiffs have appealed.

The statement of the case shows: That the defendant was a stevedore who, in January, 1881, contracted to unload the British ship Glengarry, then lying at Pacific street wharf, in San Francisco, with a cargo of coal. For the performance of his contract he provided himself with a stationary engine, with the usual gear and apparatus for hoisting the coal from the hold and dumping it into a hopper or screen on the wharf; and employed the requisite number of men to serve in the positions necessary for discharging.

The machinery consisted of a steam engine, located on the wharf; and the apparatus consisted of four coal-tubs or buckets, each of sufficient size to hold about a thousand pounds of coal, with hoisting-gear on each; and the hoisting-gear was attached by a block and pulleys to a pennant or wire rope, so stretched from the main-topmast to the foremast as to fix the point of attachment directly over the hatch.

There were twelve or thirteen men employed. One acted as foreman, who had, in his position on the deck of the ship, control and direction of the men and of the work; another as engineer, whose position was at the hoisting-engine on the wharf. Three, including the foreman, were stationed on deck near the hold, one of them in charge of a line whereby he controlled the tub as it was hoisted from the hold until it cleared the hatch; another to work a trip-line, fastened at the bottom and center of the tub, by which, when the tub was hoisted to the hopper, the coal was dumped from the tub into the hopper; and another in charge of a line by which the emptied tub was controlled and returned through the hatch to the floor of the ship. To fill or refill the tubs, eight men were stationed directly under the open hatchway—two men for each tub—whose sole duty was to shovel the coal into the tubs, and when each tub was filled to attach the rope-hook thereto, and steady it in its ascent until it cleared the hatchway. For that purpose John Brown was one of the men employed.

The men were competent and skillful to perform the duties assigned to them; and the hoisting machinery and tackle were all in good order.

On the second day of unloading the shovelers had worked down to the "skin" or floor of the ship, where they cleared a space of about three feet on the floor, directly under the hatch, and about twenty feet below the deck, the coal being around the space for a

height of about fifteen feet. In this space two of the shovelers, John Joyce and a man named "Frenchie," hurriedly filled their tub unusually high—"higher," a witness testified, "than the edge of tub. As near as I could judge, there was about four hundred pounds on the tub, above the edge of the tub." Loaded in that way the engineer was signaled to start it. It was started and safely hoisted clear of the hatchway; but when above the hatch the tub began to rock and swing, and, in that condition, it was hoisted until it swung against the mainstay, thirty feet from the deck, with such force that it tilted over, and three hundred or four hundred pounds of the coal fell out, back into the hold and upon the head of Brown, causing his death.

There is no doubt that Joyce and Frenchie were fellow-servants of Brown and if their wrongful act caused Brown's death, the defendant, as their common employer, would not be liable: Hogan v. C. P. R. R., 49 Cal., 128; McLean v. Blue Pt. M. Co., 5 Cal., 257; McDonald v. Hazeltine, 53 Cal., 35; and the nonsuit was properly granted.

But while the evidence tended to show that the act of overfilling the tub may have contributed to the accident, there was also evidence which tended to show that the accident resulted from the swinging of the overloaded tub against the mainstay, and that that could have been prevented "by stopping the engine a second, so as to let the tub swing away from the stay." According to the evidence, when the tub cleared the hatch there was nothing to obstruct its ascent until it came to the stay. From his position on the deck the duty devolved on the foreman to superintend and control the hoisting. By the sound of his whistle he could signal the hoisting-engine to start or to stop. He did not signal the engineer to stop, and the overloaded bucket was hoisted in its eccentric course until it struck the stay and tilted over with the disastrous consequences to the workman.

Assuming, as fact, that the omission to signal the engineer to stop was the cause of the catastrophe, the question arises, is the defendant legally liable for the neglect of his foreman?

Undoubtedly the foreman and other men engaged in discharging the cargo were all working for the defendants; they were, therefore, employees of the defendants, and the relation of master and servant existed between them.

But the case also shows that the defendants abdicated the control and management of the entire work to the foreman, and gave him full discretion to control and supervise it. "I was," testified the foreman, "foreman of the job, * * * and superintended it for them. * * * I employed the men for them, and they paid us all." Under that delegated power the foreman was, therefore, in the performance of the "job" in place of the master.

That being the case, the defendants would be liable for any neglect of their foreman in the performance of the work, to the same extent that they would be liable for their own neglect if they had personally

controlled and supervised it. Where employers owe a duty to their servants in the performance of work contracted to be performed, and for which the servants were employed, they are responsible to their servants for the manner of its performance.

The general rule upon the subject has been quoted, from Shearman and Redfield on Negligence, section 102, and approved by this court, in Beesom v. Green Mountain Co., 57 Cal., 31. The rule is this: "One to whom his employer commits the entire charge of the business, with power to choose his own assistants, and to control and discharge them as freely and fully as the principal himself could, is not a fellow-servant with those employed under him; and the master is answerable to all the under-servants for the negligence of such managing assistant, either in his personal conduct within the scope of his employment, or in his selection of other servants. Such, at least, appears to us to be the rule, sanctioned by the weight of authority and by sound reason, though it must be admitted that it is not everywhere established by law." It is said: "The contrary rule prevails in Massachusetts." But Chief Justice Bigelow, in Sweeny v. Old Colony and Newport Railroad Co., 10 Allen, 377, states the rule as follows: "If a person undertake to do an act or discharge a duty, by which the conduct of others may properly be regulated and governed, he is bound to perform it in such a manner that those who rightfully are led to a course of conduct or action on the faith that the act or duty will be duly and properly performed shall not suffer loss or injury by reason of his negligence."

The fact that the master exercised due care in the selection of the person to whom he delegated his power and supervision of the work does not affect the rule which holds him responsible to his servants for the manner in which the work is performed; and if, in the performance, death or injury results to a servant from the wrongful act or negligence of the person who is controlling and supervising the performance in place of the master, the master is liable; and the rule exempting him from liability for such injuries caused by the negligence of a fellow servant has no application: Trask v. Cal. S. R. R., 63 Cal., 96. The nonsuit was improperly granted.

Judgment and order reversed and cause remanded for a new trial.

MYRICK, J., THORNTON, J., and MORRISON, C. J., concurred.

WHO ARE FELLOW-SERVANTS IN COMMON EMPLOYMENT.—See Fox v. Sandford, 67 Am. Dec., 587, and note, in which this subject is discussed at length. A foreman, to whom the principal has entrusted the entire control of the work, is not a fellow-servant with his subordinates: Willis v. Oregon R'y, etc., Co., 3 West Coast Rep., 240; Gilmore v. N. P. R'y Co., 1 West Coast Rep., 455; thus a train dispatcher on a railroad is not a fellow-servant with a common track laborer; McKune v. C. S. R. R. Co., 5 West Coast Rep., 159; but a conductor and a baggage master on a train are; Colorado Cent. R. R. Co. v. Martin, 4 West Coast Rep., 563.

No. 8,242.

CAMPBELL *v.* OAKS.

Department Two. Filed December 22, 1885.

REDEMPTION BY JUDGMENT DEBTOR—PAYMENT OF PRIOR LIEN OF EXECUTION PURCHASER.—Under section 702 of the code of civil procedure, a judgment debtor is entitled to redeem property sold under execution, upon paying to the purchaser the amount of his purchase, with two per cent per month thereon up to the time of redemption, together with the amount of any assessment or taxes which the purchaser may have paid thereon after purchase, and interest on such amount, without paying a prior judgment against him, held by a partnership of which the execution purchaser is a member.

APPEAL from a judgment of the superior court of San Luis Obispo county, entered in favor of the defendant. The opinion states the facts.

J. M. Wilcoxson, for the appellant.

John Scott and *McD. R. Venable*, for the respondent.

MORRISON, C. J. This suit was brought to compel the defendant, who was the sheriff of the county of San Luis Obispo in this state, to execute to him, plaintiff, a certificate of redemption to certain lands sold under execution. The sheriff refused to execute such certificate for the reason that there was a prior lien on said lands, held by a certain partnership of which the purchaser at the execution sale was a member, and the court sustained him in his contention. The following are the findings in the case.

"I. That on the third day of January, 1881, the plaintiff was the owner in fee of the land and premises described in the plaintiff's complaint herein.

"II. That pursuant to an execution, duly and regularly issued out of the court of G. W. Barnes, Esq., a justice of the peace in and for the township of San Luis Obispo, county of San Luis Obispo, state of California, upon a judgment duly made and given therein in a certain action wherein E. Lasar was plaintiff and the plaintiff herein was defendant, the defendant, W. J. Oaks, he being then duly elected, acting and qualified sheriff of said county, duly, and in accordance with law, on the third day of January, 1881, sold said land and premises to one Ernest Cerf, for the sum of three dollars and fifteen cents, and thereupon duly issued and filed for record as required by law, a certificate of sale therefor.

"III. That on the eleventh day of January, 1881, and within six months after the sale aforesaid, this plaintiff deposited with the defendant, who was then and is now the sheriff as aforesaid, the sum of three dollars and twenty-two cents, in the same kind of money or currency in which, and for which, the sale was made, that sum being the amount paid by said Cerf for said real property, with interest thereon at the rate of two per cent per month from the date of the purchase by said Cerf, as aforesaid, to the date of such deposit, together with the amount of all assessments and taxes which said Cerf had paid thereon after the purchase by him as aforesaid, and interest on the same, and demanded from the defend-

ant that he execute and deliver to the plaintiff a certificate of redemption of said premises, which he refused and neglected, and still neglects and refuses to do by direction of said E. Cerf, the purchaser at said sale.

"IV. That the plaintiff has not alienated or conveyed to any one his interest in or to the said land or premises, and at the time of the commencement of this action was the owner of the equity of redemption thereof.

"V. That on the second day of September, A. D. 1880, in an action duly commenced and prosecuted in the superior court of the said county of San Luis Obispo, wherein A. Blochman, M. Cerf, Ernest Cerf and L. M. Kaiser, as partners under the firm name of A. Blochman & Co., were plaintiffs, and the said plaintiff herein was defendant, a judgment was duly made and entered by said court in favor of the plaintiffs in said action, and against the said J. B. Campbell, the plaintiff herein, for the sum of six hundred and fifty-three dollars and sixty-eight cents, with interest from the date of said judgment at the rate of seven per cent per annum, and also for sixteen dollars and sixty-five cents, costs of suit; that no part of said judgment has ever been paid or satisfied, except the sum of one hundred and forty-two dollars and seventy-one cents, paid thereon, and that the said judgment was subsisting and in full force, and unsatisfied at the date of the execution sale mentioned in second finding above, and still subsists and is in full force and unsatisfied, and the plaintiff has not at any time paid or tendered the amount of said judgment lien remaining so unsatisfied.

"VI. That said judgment in said action of A. Blochman & Co., against J. B. Campbell, the plaintiff herein, was recovered on an account due to said partnership, and was and is a part of the assets of the said firm; that the said E. Cerf, at the time of his purchase at said execution sale, was, and ever since has been, and now is, a member of the said firm of A. Blochman & Co., and purchased the said property at said execution sale as such member and in trust for the said firm, and with the firm money, and said purchase was by and on account of said firm of A. Blochman & Co., the said Ernest Cerf holding the title acquired by said certificate of sale issued to him by said sheriff, in trust for the said firm.

"VII. That on the said eleventh day of January, 1881, the plaintiff had notice that said E. Cerf purchased said real property with and out of the partnership moneys of the firm of A. Blochman & Co., and he had, at the time, notice that said Cerf purchased the said real property for and on account of the firm of A. Blochman & Co., and that he now holds, and did hold, the legal title to said real property in trust for said firm of A. Blochman & Co."

All the foregoing findings, down to the sixth, were admitted by the parties, but it is contended that the seventh finding was not supported by the evidence.

We cannot understand how the fact that plaintiff knew the purchaser at the execution sale was a member of the firm obtaining the

judgment in the superior court, but we think such fact was fairly deducible from the evidence in the case. But, conceding that fact, we think the court below erred in its conclusion. "The judgment debtor or redemptioner may redeem the property from the purchaser at any time within six months after the sale on paying the purchaser the amount of his purchase with two per cent per month thereon in addition up to the time of redemption, together with the amount of any assessment or taxes which the purchaser may have paid thereon after purchase, and interest on such amount, and if the purchaser be also a creditor having a prior lien to that of the redemptioner, other than the judgment under which such purchase was made, the amount of such lien with interest:" Code of civil procedure, sec. 702.

The court below held that the case came within the last clause of the foregoing section. In this we think the court erred, as the case was within the first clause, with the conditions of which the plaintiff fully complied.

We cannot see how the firm obtaining a judgment against the same defendant in the superior court could have been prejudiced by a redemption from the sale under the second judgment, as the lien of the first judgment was in no manner affected thereby. It was simply an attempted redemption by the judgment debtor whereby the sale under the second judgment would have been wiped out.

Judgment reversed and cause remanded.

SHARPSTEIN, J., and THORNTON, J., concurred.

No. 9,292.

WATERMAN ET AL. *v.* MORRELL ET AL.

Department One. Filed December 22, 1885.

CONTRACT FOR MANUFACTURING LUMBER.—Under a contract providing for the manufacture of lumber, a clause entitling one party to take "any part or the whole of the refuse lumber that may accumulate by manufacturing," refers to quantity, and not to quality, and requires that it be taken as a whole, and not culled and picked over for the best pieces.

THE CONTRACT SUED ON CONSTRUED, and held that the defendants had complied with the conditions on their part as to payment.

APPEAL from a judgment of the superior court of Santa Cruz county, entered in favor of the defendants, and from an order denying the plaintiffs a new trial. The opinion states the facts.

Goldsby & Jeter and *Bart Burke*, for the appellants.

S. O. Houghton, for the respondents.

BELCHER, C. C. This is an appeal from a judgment of nonsuit, and an order denying a motion for a new trial.

The action is based upon a written contract, executed September 23, 1881, by which the plaintiffs leased to the defendants certain timber land in the county of Santa Cruz, for the term of three years, and the defendants undertook to cut and manufacture into lumber all

the redwood and fir trees standing on the land and suitable for milling purposes.

It was provided in the contract that on or before the fifth day of each month, the defendants should render to the plaintiffs "a full written account of all merchantable lumber shipped each day during the preceding month, and must, within ten days after such account has been rendered, pay, or cause to be paid, to said Waterman and Waterman, for each one thousand feet of merchantable lumber, the sum of two dollars and fifty cents in gold coin."

It was further provided that in case the defendants "should not manufacture the timber trees standing" on the land leased in the year 1881, then they should, on the first day of January, 1882, pay to the plaintiffs "the sum of two dollars and fifty cents per thousand feet on one-third of all merchantable timber cut and shipped by them from their mill" on another tract.

It was further provided that plaintiffs should have the right to any part or the whole of the refuse lumber that might accumulate by manufacturing said timber into lumber, for the price of seven dollars and fifty cents per thousand feet, the money to be credited by the plaintiffs to the defendants on the account for stumpage.

It is alleged in the complaint that the defendants had manufactured from trees cut on the demised premises, and had shipped four hundred and fifty thousand feet of merchantable lumber, for which the defendants became indebted to the plaintiffs in the sum of one thousand one hundred and twenty-five dollars, and that no part of that sum had been paid; that the defendants had failed to render any account to the plaintiffs of the lumber manufactured and shipped by them, as required by the contract, and had failed and refused to let the plaintiffs have or take, at their election, "any part or all of the refuse lumber" upon the terms and at the prices named in the contract.

The prayer is for judgment for the one thousand one hundred and twenty-five dollars, and for one thousand dollars damages.

From the evidence it appears that the defendants cut no timber and manufactured no lumber on the plaintiffs' land in the year 1881, but they manufactured at the mill on their other tract such a quantity that they were required, under the terms of their contract, to pay to the plaintiffs on the first day of January, 1882, the sum of one thousand two hundred and twenty-five dollars and eighty-eight cents. This sum they paid to the plaintiffs on the thirty-first day of December, 1881, and took from them a receipt reading as follows:

"Received of Morrell and Spidell one thousand two hundred and twenty-five dollars and eighty-eight cents on account of stumpage on a certain contract dated September 23, 1881.

"W. W. WATERMAN."

The defendants did not commence to manufacture lumber on the demised land, until September 20, 1882, but during the balance of that month, and the next month, they manufactured and shipped therefrom three hundred and forty-six thousand seven hundred and

thirteen feet, for which the stumpage, at two dollars and fifty cents per thousand, amounted to eight hundred and sixty-six dollars and seventy-seven cents.

They made no report of the lumber shipped, until the fourth day of November, when they rendered to the plaintiffs a full written account of all merchantable lumber shipped each day during the preceding two months.

On the day the defendants commenced manufacturing lumber on the plaintiffs' land—September 20—the plaintiffs went to the defendants to talk about the refuse lumber. They said they wanted a considerable quantity of it, but were not then prepared to say how much. They claimed the right to select from the mass of refuse the best of it, and leave the balance to the defendants. The defendants objected to this, but offered to let the plaintiffs take all the refuse during an hour's run, a day's run, a week's run, or a month's run. Afterwards, on October 18, the defendants sent to the plaintiffs a written notice that they could "take any part or the whole of the refuse lumber as it comes from the saw."

The plaintiffs made no demand for pay for the lumber shipped, and no further demand for refuse lumber, until the third day of November, 1882, when this action was commenced.

1. It is claimed for the appellants, that the court erred in granting the nonsuit, for the reason that the defendants were required by the contract to manufacture the plaintiffs' trees into lumber during the year 1881, and that the one thousand two hundred and twenty-five dollars and eighty-eight cents was paid as liquidated damages, or as a penalty for their failure to comply with this condition, and not upon account for the lumber to be thereafter manufactured and shipped.

Clearly this was not the understanding of the parties when the receipt for the money was given and received; and looking at the language of the contract and the circumstances attending the transaction, we fail to see anything to warrant the claim made.

The court below was right, we think, in holding that the money was paid upon account, and that nothing was, therefore, due the plaintiffs for lumber shipped when the action was commenced.

2. It is also claimed that the defendants failed to make any report in October of the lumber shipped in September, and that the plaintiffs were damaged by this failure.

It appears that the defendants commenced to ship lumber, manufactured from the plaintiffs' trees, on the twenty-first of September, and that they made no report until November. This may have been a technical breach of the contract, but if so, it was one which could not in any way have injured the plaintiffs, as they had been paid in full for all the lumber shipped.

3. The only other point made is, that the plaintiffs were denied the right to cull from the refuse the best parts of it, leaving all the poorer pieces for the defendants. It is said if the best pieces could have been selected out of the mass of refuse, they would have been

worth ten dollars per thousand feet, and that, as the plaintiffs were to pay only seven dollars and fifty cents per thousand, they clearly suffered damages by the denial, which should have been found and awarded to them.

Under the contract the plaintiffs were entitled to take "any part or the whole of the refuse lumber that may accumulate by manufacturing said timber into lumber." Do these words justify the claim of the plaintiffs? We think not. We agree with the court below that they refer to quantity and not quality, and that they authorized the plaintiffs to take the whole or any fractional part of the refuse, but required that it be taken as a whole and not culled and picked over for the best pieces.

It follows that the judgment and order should be affirmed.

SEARLS, C., and FOOTE, C., concurred.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

No. 9,258.

DOUGHERTY v. FRIERMUTH.

Department One. Filed December 23, 1885.

WAIVER OF FINDINGS—STIPULATION FOR—ESTOPPEL.—A party is estopped to object to the want of findings, if he stipulated in writing that findings should be waived, although such stipulation was not filed until after entry of judgment.

APPEAL from a judgment of the superior court of Alameda county, entered in favor of the defendant. The opinion states the facts.

John J. Coffey, for the appellant.

Tully R. Wise, Moultrie & McLean and *A. L. Rhodes*, for the respondent.

ROSS, J. Appellant contends that the judgment should be reversed because of a failure of the court to file findings of fact. It is provided by section 634 of the code of civil procedure, that such findings may be waived "by consent in writing, filed with the clerk." The waiver of findings, as said by respondent's counsel, amounts to no more than waiver of objection to the rendition of judgment without findings. In the present case the attorneys for the plaintiff, who is the appellant, signed a stipulation in writing, in which it was "agreed that findings in this case are waived." The stipulation was not filed with the clerk until some days subsequent to the entry of judgment, but we cannot see that that circumstance alters the effect of the stipulation, which we think is to estop the plaintiff from making the objection that no findings were filed.

Judgment affirmed.

MCKINSTRY, J., and MCKEE, J., concurred.

No. 9,347.

DAHL ET AL. *v.* PALACHE ET AL.

Department One. Filed December 23, 1885.

PROTESTANT EPISCOPAL CHURCH—ELECTION OF VESTRYMEN—NOTICE OF.—Canon 4 of the Protestant Episcopal Church of the United States, provides that the election of vestrymen shall be held "on Easter Monday of each year, or as soon thereafter as practicable" and that "notice of such election shall be given during divine service upon the Sunday previous thereto." *Held*, that notice of an election, not held on Easter Monday, was requisite to its validity; and that a notice given at a service commenced and conducted much earlier than the appointed hour for divine service, was insufficient.

APPEAL from a judgment of the superior court of the city and county of San Francisco, entered in favor of the plaintiffs. The opinion states the facts.

Stanly, Stoney & Hayes and *Philip Teare*, for the appellants.

Ben Morgan, for the respondents.

ROSS, J. At least one point made on behalf of the defendants is fatal to plaintiffs' claim that they are the duly elected vestrymen of the parish in question. The bill of exceptions recites: That on the trial, evidence was given showing that the parish of St. Mark's is a voluntary religious association or congregation organized under and subject in all things to the constitution, canons, regulation and discipline of the Protestant Episcopal Church of the United States, and of the diocese of California, and was such from the twenty-ninth day of May, 1882. That said parish has never been incorporated. That on and before the said twenty-ninth of May, it was known as the Bishop Berkeley Mission, and was under the control of the bishop of the diocese and the board of missions thereof. That by the canons of said Protestant Episcopal Church, regulating such matters, the minister in charge of such mission was appointed by the said board of missions on the nomination of the bishop and was subject to removal by the bishop at any time. That on the twenty-ninth day of May, 1882, the Rev. E. S. Greene was the missionary in charge of said mission. That on that day the said mission was, with the previous consent of the bishop of the diocese, and in pursuance of the canons of the church, regularly organized into and became a parish under the name of St. Mark's Parish, and at the same time the defendants were duly elected vestrymen of the parish, to serve until their successors should be duly elected. That one of the duties of the vestry was to elect a rector to take charge of the spiritual affairs of the parish, which duty was and is regulated by sections 1, 2 and 3 of canon v., which read as follows:

"CANON 5—THE RECTOR. Section 1. The rector of a parish shall be elected by a majority of all the vestry, duly convened after legal notice, specifying such election to be the object of the meeting.

"Sec. 2. Upon the election of rector, or of an assistant minister, the church wardens shall give immediate notice thereof to the ecclesiastical authority of the diocese, whereupon the person

elected may enter upon the duties of his calling; *provided*, that the said authority, and the bishop, acting by and with the consent of the standing committee of the diocese, may veto said election, in which event the election shall be null and void.

"Sec. 3. First—Whenever the rectorship of a parish becomes vacant it shall be the duty of the vestry to give immediate notice to the ecclesiastical authority.

"Second—The ecclesiastical authority may supply, by appointment, such vacancy until a rector shall be elected."

That immediately after the organization of the parish and the election of the defendants as vestrymen, a meeting of four of the five vestrymen elect was held, without any previous notice whatever of such meeting, and without the knowledge of the other vestryman that he had been so elected; at which meeting a resolution was adopted that the Rev. E. S. Greene be elected rector of the parish, who consented thereto, he being present at the meeting. That no notice of such election was ever given to the bishop, who was then and still is the ecclesiastical authority of the diocese, nor was any action taken by the bishop with respect to such election, before the appointment by the bishop of the Rev. David McClure to supply the vacancy in said rectorship as hereinafter stated. That on the twenty-fourth day of July, 1883, at a meeting of the vestry of the parish, regularly held, a resolution was adopted rescinding the resolution electing the Rev. E. S. Greene as rector, and declaring the rectorship of the parish vacant, and directing the clerk of the vestry to notify the bishop of the diocese of the vacancy and to request him to appoint a minister to supply it. That notice of such action was given to the bishop and to the Rev. E. S. Greene. That thereafter and before the twenty-ninth day of July, 1883, the said bishop, as the ecclesiastical authority of the diocese, did authorize and direct the Rev. David McClure to supply the vacancy until a rector should be elected, notice of which was given to the said Rev. David McClure and to the vestry and to the said Rev. E. S. Greene. That according to the canons and regulations of the said Protestant Episcopal Church the temporalities of a parish are managed by vestrymen whose duties, time and manner of election and term of office are prescribed by sections 1 and 2 of canon iv., which read as follows:

"CANON 4—THE VESTRY. Section 1. On Easter Monday of each year, or as soon thereafter as practicable, there shall be an election of not less than three, nor more than eleven vestryman and trustees, or vestrymen and directors, *provided*, that any parish now in existence may elect such number of vestrymen as their articles of incorporation may require, the same being at least twenty-one years of age, to manage the temporalities of the parish, who shall have power to fill vacancies in their own body, and shall continue in office until their successors are duly elected. Notice of such election shall be given during the divine service upon the Sunday previous thereto.

"2nd. The election of vestrymen shall be by ballot, and any male person of twenty-one years of age, who for the previous sixty days

shall have been registered a communicant, and any male person of like age, who shall have been a member of the congregation for a like period, and has regularly contributed to the support of the parish, shall be entitled to vote."

That on July 29, 1883, the hour of eleven o'clock was, and during the existence of said parish always had been, the time of commencing the Sunday morning divine service, and no other or different hour had been appointed or announced for such service for that day. That, without previous notice to the congregation of any change of the hour of service, and knowing that the bishop had appointed the Rev. David McClure to officiate as minister in said parish, and that he was expected to hold divine service in the said church at the regular hour of eleven A. M. of said twenty-ninth day of July, 1883, the said Rev. E. S. Greene did, about the hour of nine o'clock in the morning of that day, enter the said church, and thereupon commenced to hold the services of said Protestant Episcopal Church, and intentionally continued and protracted the same to an unusual extent, and until after the hour of eleven o'clock, and after the arrival of the said Rev. David McClure, and refused to suspend said services, and prevented the said Rev. David McClure from officiating. That while the Rev. E. S. Greene was so officiating in said church, and before the said regular hour for morning service, he gave notice to the persons present and attending said services, that on Monday, July 30, 1883, at eight P. M., an election would be held in said church building of five vestrymen, to serve until their successors should be elected; that on Monday evening, July 30, 1883, said church and building was locked, and the key thereof was in possession of the marshal of the town of Berkeley, and access thereto could not be had, and such election could not be held therein; that at the hour named in said notice, a meeting of certain members of said parish was held at the residence of J. B. Whitcomb, on the same street with said building, but distant therefrom about two blocks; that said meeting was held in the dining room of said residence, and the Rev. E. S. Greene presided; that the number of persons then present and taking part in the proceedings, were eight or ten, including the five plaintiffs; that all of the persons so participating were qualified to vote for vestrymen of the parish; that the plaintiffs were the only persons nominated for the office of vestrymen at said meeting, whereupon a motion was made and carried, no one dissenting, that the secretary of the meeting cast the ballot for those present in favor of the plaintiffs. That the secretary did then and there prepare such ballot and deposit the same in a hat, and thereupon the plaintiffs were declared duly elected vestrymen of said parish. That no election of vestrymen therefor had been held on Easter Monday, 1883, or at any time since the election of the defendants, in 1882. That no request, at any time, was made by any one that the defendants, or any of them, as the vestry, or as vestrymen, should call an election or cause an election to be held for their successors, and neither of them had any notice or knowledge of said proposed elec-

tion on the thirtieth of July. That on Easter Monday, 1883, and for some time thereafter, and until a short time before the alleged election of the plaintiffs, it was understood and believed by the vestrymen and congregation of St. Mark's parish that the steps taken to organize the said parish had been incomplete and inadequate, and that the parish was still a mission.

The facts above detailed were proved in the court below, according to the bill of exceptions contained in the record. Concerning the propriety of the proceedings it is not for us to speak. And but little need be said in regard to the law applicable to the facts.

As has been seen, the canon provides that an election of vestrymen shall be held "on Easter Monday of each year, or as soon thereafter as practicable," and it is expressly provided that "notice of such election shall be given during divine service upon the Sunday previous thereto." Whether an election on Easter Monday would or would not be valid without notice thereof need not be determined, but we think that it does not admit of doubt that notice of an election not so held is requisite to its validity.

We need only inquire further, was the notice given by the Rev. Mr. Greene at the services inaugurated by him at 9 o'clock in the morning of July 29, the notice required by the canon of the church? Was the service commenced and conducted by him at the time and in the manner stated in the proof, the "divine service" spoken of in the canon? There can be but one answer to this, and that must be in the negative.

Judgment reversed and cause remanded.

McKEE, J., and McKINSTRY, J., concurred.

No. 9,144.

WHITMAN v. HAY.

Department One. Filed December 23, 1885.

JUDGMENT AFFIRMED FOR FAILURE TO FILE POINTS and authorities.

APPEAL from a judgment of the superior court of the city and county of San Francisco.

Joseph D. Redding, for the appellant.

McPike & Bonney, for the respondent.

THE COURT. The record in this case shows that it was submitted for decision on the twenty-fourth of September, 1885, on briefs on file, and that no briefs have at any time been filed.

For want of points and authorities judgment affirmed.

No. 8,766.

CASEY ET AL. *v.* JORDAN ET AL.

Department One. Filed December 23, 1885.

JUDGMENT REVERSED FOR FAILURE TO FIND ON THE ISSUES.

APPEAL from a judgment of the superior court of the city and county of San Francisco.

Sawyer & Ball, for the appellants.

E. M. Gibson, *Willis Whitmore* and *T. J. Crowley*, for the respondents.

THE COURT. For want of findings upon the issues the judgment and order are reversed and cause remanded for a new trial.

No. 9,238.

CASEY ET AL. *v.* JORDAN ET AL.

Department One. Filed December 23, 1885.

PLAINTIFF CANNOT DISMISS ACTION AFTER TRIAL AND SUBMISSION.—After a cause has been regularly tried and submitted for decision it cannot be dismissed on plaintiff's motion.

APPEAL from a judgment of the superior court of the city and county of San Francisco, entered in favor of the defendants. The opinion states the facts.

Sawyer & Ball, for the appellants.

T. J. Crowley, for the respondents.

ROSS, J. In this case the court below gave judgment for the defendant, upon the ground that at the time of the commencement of the action there was another action pending between the parties for the same cause. The other action referred to is the suit entitled Casey v. Jordan, No. 8,766, *ante*, just decided here and remanded to the court below for a new trial. The cause of action in the two suits is substantially the same. The first action was tried in the court below and submitted to the court for decision upon the briefs to be filed by the respective parties, and in that condition of the case the court, on motion of the plaintiffs, caused to be entered in the minutes an order dismissing the action without prejudice to another. Two days afterward the order of dismissal was vacated by the court on motion of the defendants in the action. In the meantime the second action was commenced.

The order of dismissal was invalid, for, after the cause had been regularly tried and submitted for decision, it could not be dismissed on plaintiffs' motion: Heinlen v. Castro, 22 Cal., 102. The order of dismissal was, therefore, rightly vacated and the suit carried to judgment.

Judgment affirmed.

MCKEE, J., and MCKINSTRY, J., concurred.

No. 9,293.

MULLINS v. WIELAND.

Department One. Filed December 23, 1885.

NEW TRIAL—VERDICT—CONFLICT OF EVIDENCE.—An order granting a new trial, on the ground that the evidence was insufficient to sustain the verdict, will not be reversed on appeal, when the evidence is conflicting.

APPEAL from an order of the superior court of the city and county of San Francisco, granting the defendant a new trial. The opinion states the facts.

Clunie & Knight, for the appellant.

Loughborough & Newhall, for the respondent.

MCKEE, J. After the return of a verdict for six thousand dollars in this action the defendant moved for a new trial on a statement of the case. Upon motion the court ordered that a new trial be granted and from the order the plaintiff appealed.

The motion was made and the order entered upon the ground that the evidence was insufficient to sustain the verdict.

The record shows that the action in which the verdict was rendered was brought to recover damages for personal injuries sustained by the plaintiff from the fall of an elevator—a distance of sixty feet from the top story to the basement of a building known as the Philadelphia Brewery, the property of John Wieland. On the trial, evidence was given sufficient to establish as incontrovertible facts that the proprietor of the brewery had contracted with the Columbia Foundry for the laying of an iron floor in the second story of the brewery; that for the purpose of commencing performance of the contract the foreman of the foundry, on the twenty-third of May, 1882, went to the brewery, taking with him two servants of the foundry and about thirty-six square iron plates, each weighing about four hundred pounds, which were to be used in the work of laying the floor. One of these servant was the plaintiff in the action, who was permanently injured by the fall of the elevator while engaged with his fellow-servant in the duty of taking up on the elevator one of the iron plates to the second story of the building.

It is conceded that the injuries to the plaintiff were caused by the gross negligence of a servant of the brewery in running the elevator. But there was evidence given which tended to show that the servant was employed only to do general work about the cellar, to mark beer barrels, and to load and unload the elevator, and that he was not employed and was not authorized to run the elevator. Yet he was the only servant of the brewery at or near the elevator when the plaintiff got on it with the iron plate to go up to the second story of the building.

The issues which were presented to the jury upon the evidence in the case involved: First—Whether the defendant, by his foreman, granted the use of the elevator to the foreman of the foundry for the

purpose for which it was used; second—Whether the servant of the brewery that ran the elevator, in connection with that use of it, was authorized to run it; or, third—Whether, if another was employed for that purpose and was not present to perform his duty at the time the foundry was using it, was the servant who operated it left temporarily in charge of it, or was the foreman of the brewery negligent in not seeing that the regular operator of the elevator was present to perform his duty.

These were all questions of fact for the jury, and there was evidence given for and against their existence as facts. Upon the evidence the jury found for the plaintiff. But the verdict was founded upon conflicting evidence; and on the motion for a new trial the court, to whose discretion the motion was addressed, determined that the evidence was wholly insufficient to sustain the verdict. That being so, we cannot say, as matter of law, that the court abused its discretion in granting a new trial: Pierce v. Schaden, 55 Cal., 406; Bronner v. Wetzlar, 55 Cal., 419; Blum v. Sunol, 63 Cal., 341.

Order affirmed.

ROSS, J., and MCKINSTRY, J., concurred.

No. 11,182.

POUPION *v.* MUZIO.

Department One. Filed December 23, 1885.

FILING TRANSCRIPT—EXTENSION OF TIME FOR, BY STIPULATION—DISMISSAL OF APPEAL.—Failure to file the transcript, within the time prescribed by the rules of the supreme court, will not warrant a dismissal of the appeal, if, at the time of the motion to dismiss, the appellant offers to file it, and it appears that the parties had, by a stipulation not filed, extended the time for filing to a date beyond the hearing of the motion.

MOTION to dismiss an appeal from the superior court of the city and county of San Francisco. The opinion states the facts.

A. J. LeBreton, for the appellant.

Gustave Touchard, for the respondent.

ROSS, J. The respondent moved to dismiss the appeal herein, because of the failure of appellant to file the transcript within the time prescribed by a rule of this court. Appellant, in answer to the motion, offered to file the printed transcript, and at the same time presented a written stipulation signed by the attorney of record of respondent, extending the time to file the transcript to a date beyond the hearing of the motion. It is objected that the stipulation is of no effect because not filed with the clerk. But we think that in a matter relating only to the time in which the record on appeal shall be filed here, the objection is not well taken, and that the appeal should not be dismissed.

Motion denied.

MCKEE, J., and MCKINSTRY, J., concurred.

No. 9,298.

PETERSON v. HUBBARD.

Department One. Filed December 23, 1885.

BREACH OF CONTRACT—ALLEGATION IN ANSWER CONSTRUED.—In an action to recover for the breach of a stipulation in an agreement, to the effect that the defendant would not, in the building of a certain mill, "let any sawdust or rubbish be put into the stream so as to injure or prevent the use of the same for plaintiff's family use," an allegation in the answer that the defendant prevented the sawdust and rubbish from being carried down by the stream, and that the waters thereof were not rendered impure, etc., by reason of such sawdust and rubbish, constitutes a valid defense.

SETTLEMENT AND PAYMENT IN FULL IS A VALID DEFENSE to an action for breach of contract.

IN SUCH ACTION THE FINDINGS HELD TO COVER THE ISSUE and to be sustained by the evidence.

FINDINGS—NOT NECESSARY ON AFFIRMATIVE DEFENSE NOT SUPPORTED BY PROOF.—Where judgment is rendered for the defendant, a finding upon an affirmative defense, which is not supported by proof, is not necessary.

APPEAL from a judgment of the superior court of Santa Cruz county, entered in favor of the defendant, and from an order denying the plaintiff a new trial. The opinion states the facts.

Z. N. Goldsby, for the appellant.

A. E. Bolton, for the respondent.

MCKEE, J. In this case the appellant contends that the judgment and order appealed from should be reversed, because (1) the court below erred in overruling a general demurrer to those portions of defendant's answer designated as his second and third defenses; (2) because the decision and judgment of the court are based on the findings of particular facts which were not within the issues of the case, and also upon certain facts which were not sustained by the evidence, and (3) because of a want of finding upon some of the material issues in the case.

The case arises out of an action to recover damages for the breach of a contract by which the defendant agreed to build a sawmill upon a tract of land situated on the forks of Collins creek, in Santa Cruz county, and manufacture into lumber the timber upon it, for which payment at a stipulated price was to be made to the plaintiff.

Construction of the mill, the manufacture of lumber thereat, from April, 1880, until January, 1881, and payment to the plaintiff, according to the terms of the contract, were admitted. But it appears at the date of the contract the plaintiff had a flume on the land on which the contract was to be performed, by which he obtained from the creek a supply of water for domestic purposes, at his house and premises bordering on the creek. This flume extended from a point in the creek about seven hundred yards below the mill site on which the mill was to be built, and the contract contained a stipulation that "the said Hubbard is not to let any sawdust or rubbish be put into said streams of water so as to injure and prevent the use of the same for his, said Peterson's, family use." This agreement, it is charged, the defendant violated, by depositing and causing to be deposited on the banks of the creek

and in the creek, at and near the mill, large quantities of "sawdust and other rubbish," which were brought down by the creek into and through the plaintiff's flume to his house and premises, "rendering the water impure, corrupt, unwholesome and unfit for family use," to his great damage.

The answer filed by the defendant contained a general denial and also separate statements of facts, by way of defense, showing (1) impossibility of building and operating the mill so as to stop the fall of sawdust and rubbish from the mill into the stream, and performance of the contract by lawful and proper means, which prevented the sawdust and rubbish from being carried down by the stream, or through the plaintiff's flume, so as not to injure or render impure the water which flowed through the flume to the plaintiff's house and premises; and (2) performance of the contract by settlement and payment in full.

There was no prejudicial error in overruling the general demurrers interposed to those special defenses.

The object of the contract was to prevent sawdust and rubbish from the mill, which would, of necessity, fall into the creek while operating the mill, from "being put into said streams of water so as to injure and prevent the use of the same for the plaintiff's family use." That object was achievable. However inconvenient it might be, it was not impossible. Performance of the contract, was, therefore, possible: Section 1,597, C. C.; and defendant was bound to perform it. But he was entitled to allege and prove substantial performance of the contract, and the allegations that he did, by lawful and proper means, prevent the sawdust and rubbish from the mill from being carried down to the plaintiff's flume, and that the water of the creek which flowed through the flume to the plaintiff's house and premises was not injured or rendered impure, corrupt, unwholesome or unfit for use by the sawdust and rubbish from the mill, constituted a valid defense.

Settlement and payment in full, also constitute a valid defense to an action for an alleged breach of the contract.

The facts found by the court were within the issues made by the answer and complaint. The finding covers the issues, and it is sustained by the evidence in the case.

There was no finding necessary upon the defense in the answer of settlement and payment, because the defense was not supported by proof: Campbell v. B. R. & A. W. Co., 35 Cal., 682.

Judgment and order denying a new trial affirmed.

ROSS, J., concurred.

MCKINSTRY, J. I concur in the judgment.

No. 9,079.

CLUTE v. LOVELAND.

Department One. Filed December 23, 1885.

SAN FRANCISCO STOCK EXCHANGE—SEATS IN MAY BE SOLD UNDER EXECUTION—FORECLOSURE OF LIEN.—The San Francisco Stock and Exchange Board is a voluntary association, consisting of one hundred members, formed for the purpose of dealing in, and buying and selling stocks on commission. The Company of Associated Stockbrokers, is a corporation, composed solely of the members of said voluntary association; the members of the association and corporation are entitled to an equal share of its property, effects and assets; the only qualification for membership in the corporation is, that such member shall be a member in good standing of the voluntary association and shall sign the constitution and by-laws of the corporation; the corporation was formed for the purpose of receiving donations with which to purchase land on which to erect a building for the use of its members, and has no shares or capital stock; each member's right and title to the property, goods, effects and assets of the association, and the privilege of participating in the meetings of the board, is represented by what is called and known as a "seat in the San Francisco Stock and Exchange Board." By the rules of the board, each member has the right to voluntarily dispose of his seat in the same, but the purchaser, before he can participate in the proceedings of the board, must be elected a member thereof. *Held*, that the property, the legal title to which stands in the corporation called the Company of Associated Stockbrokers, is, in equity, the property of the members of the San Francisco Stock and Exchange Board; that the power given to each member of the board to "dispose" of his seat, includes the power to dispose of it absolutely or conditionally; that such member could assign his seat as security for an indebtedness; that the lien thereby created could be foreclosed in a judicial proceeding and the seat sold, subject to the rules of the association.

APPEAL from a judgment of the superior court of the city and county of San Francisco. The opinion states the facts.

A. B. Hunt, for the appellant.

Estee & Boalt, for the respondent.

ROSS, J. The findings show that during the times mentioned in the record the San Francisco Stock and Exchange Board was, and yet is, a voluntary association, consisting of one hundred members, formed for the purpose of dealing in stocks, and buying and selling the same on commission, in the city and county of San Francisco. That the Company of Associated Stockbrokers was, and yet is, a corporation, organized and existing under the laws of the state, with its principal place of business in the said city. That the said corporation was formed by, and is composed of, the members of said volunteer association, solely, of both of which institutions the defendant in this action was at all times, and yet is, a member. That the members of the association and of the corporation are entitled to an equal share or proportion of its property, effects and assets; that the only qualification for membership in the corporation is that such member shall be a member in good standing of the volunteer association, and shall sign the constitution and by-laws of the corporation. That the corporation was formed for the purpose of receiving donations with which to purchase land in the city of San Francisco, upon which to erect a building for the use of its members as stockbrokers, and has no shares or capital stock. That the lot of land described in the complaint was purchased, and the building thereon erected, in 1875, with the funds belonging to the aforesaid volunteer association, at a cost of more than five hundred thousand dollars, in which building the board has since held its sessions. That each

member's right and title to the property, goods, effects and assets of the association, and the privilege of participating in the meeting of the board, is represented by what is called and known as a "seat in the San Francisco Stock and Exchange Board." That, by the rules of the board, each member has the right to voluntarily dispose of his seat in the same, but the purchaser, before he can participate in the proceedings of the board, must be elected a member thereof. That, by the said rules, the seat and privilege of every member is deemed and taken to be, from the time of his admission, and so long as he continues a member, a continuing security to all members of the board with whom he may deal, for the performance of his contracts and the fulfillment of his engagements. That the association is possessed of personal property, a portion of which is money. That the value of a seat in the board at the time of the trial of this action was at least six thousand dollars. That, by a provision of the constitution of the board, any member failing to meet his engagements therein shall be suspended until he has settled with his creditors. That the defendant to this action, in January, 1877, was unable to meet his engagements with the members of the board, for which reason his privileges as a member thereof were suspended. That thereafter the plaintiff to this action paid to the members of the board the amount of the defendant's indebtedness to them, and defendant was thereupon restored to his privileges as a member of the board.

And it is at this point that the contract between the plaintiff and defendant, which forms the basis of this action, comes in. It was a contract of partnership between the parties, by which they associated themselves together to buy and sell stock on commission, the defendant herein contributing his seat in the board, which, for the purposes of the partnership, was valued at eighteen thousand dollars, and which, by the terms of the agreement, was to go back to him at the same valuation at the expiration of the partnership, the term of which was fixed at one year.

The contract then proceeds: "Said Clute, the plaintiff herein, has advanced to said Loveland, defendant, for his private purposes and account, the sum of nine thousand dollars, gold coin, and until the same is repaid to him by said Loveland, his said advances shall stand in lieu of his part of the capital to be contributed, and he shall have a lien for the same on the seat of said Loveland in said stock board, and on certain life policies transferred to said Clute by said Loveland, but all moneys paid by said Loveland to said Clute, shall be applied on his indebtedness, and shall reduce said Clute's lien as aforesaid. Said Clute shall contribute, as capital, sums of money from time to time to said business, equal to the amounts paid him by said Loveland up to the amount of nine thousand dollars, so that the capital contributed by both parties shall be equal." The agreement contained other provisions not important to mention.

The complaint sets out substantially the facts above detailed, and charges that the plaintiff on or before August 22, 1877, paid and

advanced for the private uses and purposes of defendant the sum of nine thousand dollars in gold coin, for the repayment of which defendant mortgaged, pledged and hypothecated his said seat in said board, and also was to transfer as future security for said advances certain life polices by him held; that defendant has never paid plaintiff said advances of nine thousand dollars nor any part thereof, nor has he ever transferred to plaintiff the policies of insurance; that the firm formed by plaintiff and defendant, during its existence, did a large business and accumulated large profits, almost all of which defendant appropriated to his own use; that the firm is largely in debt, and has debts due it, and is owing plaintiff the sum of thirty-three thousand and ninety dollars and fifty-one cents, "for and on account of moneys and profits belonging to plaintiff, and interest upon the same, by him left in said firm, and also for and on account of moneys by said plaintiff loaned, paid out and advanced to and for the use and benefit of said firm;" that defendant has no property and effects, except said seat in said board, and his interest in said association, and in said firm accounts; that plaintiff has often demanded of defendant a settlement of the firm business, and that defendant refused to plaintiff the said sum of nine thousand dollars, all of which demands have been refused. The prayer is for an accounting and settlement of the firm accounts, and that plaintiff's alleged lien on defendant's seat in the San Francisco Stock and Exchange Board be foreclosed, and said seat sold to satisfy the nine thousand dollars indebtedness from defendant to plaintiff, and for such other and further relief as should be equitable.

In addition to the findings already stated, the court below found that defendant has never repaid any part of the nine thousand dollars paid by plaintiff on defendant's indebtedness to the members of the Stock and Exchange Board, and that at the commencement of this action the same was due and unpaid. The court further found that defendant is indebted to plaintiff in the further sum of fourteen thousand five hundred and eighty dollars and ninety-nine cents, for and on account of moneys drawn by defendant from the partnership business. The court further found as a fact that the contract between the parties "in form creates a good and sufficient lien or mortgage on the seat of defendant in the San Francisco Stock and Exchange Board, to secure the repayment of said sum of nine thousand dollars paid by said Clute on the indebtedness of said Loveland, as aforesaid."

From the facts found, the court concluded that plaintiff was entitled to a personal judgment against defendant for the aggregate amount of the sums found due and costs of suit, but that plaintiff did not acquire any lien on the seat of the defendant in the San Francisco Stock and Exchange Board, and judgment was entered accordingly. In so far as the court refused to award the plaintiff the lien claimed, and to enforce the same, the plaintiff claims there was error, and hence appeals from the judgment.

The action of the court below was based on the nature of the property on which the parties sought to create a lien, the court being of opinion that it was of such a character as not to admit of the creation of a lien thereon as between the parties to this suit. In this we think there was error. The property, the legal title to which stands in the corporation called the Company of Associated Stockbrokers, is in equity the property of the members of the San Francisco Stock and Exchange Board. This is plain from the facts found and the settled law as applicable thereto: Charter v. San Francisco S. R. Co., 19 Cal., 246; Shorb v. Beaudry, 56 Cal., 450; Cornell v. Corbin, 64 Cal., 200; Durkee v. Stringham, 8 Wis., 124. Now, by the rules and regulations of the association each member is entitled to an equal share of all the property, goods, effects and assets of the association, and his right and title thereto is represented by what is called a "seat in the San Francisco Stock and Exchange Board." The rules expressly authorize each member to dispose of his seat, subject, however, to the condition that before the purchaser can participate in the proceedings of the board he must be elected a member thereof. The power to "dispose" of the seat includes the power to dispose of it absolutely or conditionally. If a member should sell his seat to one who should not be elected a member of the board, it cannot be doubted that such purchaser would take, subject to the conditions imposed by the rules of the association, the interest of the seller in the property of the association. And if he may sell this, why not create a lien upon it, subject to the same conditions? As has been seen the power given is to "dispose" of the seat. Whether the disposition be absolute at the beginning, or subsequently becomes so through judicial proceedings, the result is the same. The purchaser takes the interest of him who disposes, subject to the conditions imposed by the rules of the association. But we can see no reason why he may not take this.

In Durkee v. Stringham, 8 Wis., above cited, it appeared that a number of persons associated themselves together and formed what was called in the written articles of association the Neshoto Lumbering Company. The declared object of the company was to raise moneys to be employed for the benefit of the members of the association in the purchase and sale of lands situated on the borders and in the vicinity of Twin rivers, in Wisconsin, to build mills, etc., The capital stock, consisting almost exclusively of real estate, was divided into four hundred shares, for which the ordinary certificates were issued, declaring that the holder was proprietor of —— shares in the capital stock and beneficial interests of the company, and had paid the sum of —— dollars on each share, and that the same was subject to all the provisions, covenants and charges contained in the articles of association. These certificates of stock were made transferable by assignment, and it was provided in the articles of the association that the capital of the company, notwithstanding the conversion of any part of it into land, should be deemed and treated as

personal property. The title of the real estate and of the personal property was vested in a trustee, in trust for the use of the company, who was the authorized agent to sell, bargain and convey the personal property, to lease the lands, make conveyances, and in his name to take all conveyances as trustee for the company. "Each certificate," said the court, "represented an equitable title or interest in the property of the association. It is obvious that a stockholder who might own one hundred shares would, as between him and the other stockholders, be equitably entitled to one-fifth part of the property. * * * Now, by every principle of law, it would seem that those certificates of stock, which, for convenience, were made transferable by assignment, represented a proportionable interest in the property of the company, an interest which a court of equity would protect, and could be sold, pledged or mortgaged by the owner like any other kind or species of property. The mortgagee of such certificates would likewise have such an equitable lien or interest in the company property as a court would recognize and protect. This proposition, to our minds, is too plain for argument, and we would not have supposed that a doubt could be entertained upon the point had not the circuit court held otherwise, as we understand their decision."

There, as here, the association was unincorporated, and the title to the property was held by a trustee—in that case, by a member of the association; in this, by a corporation composed of all the members of the association, and formed for that very purpose. In that case, the interest of each member of the association was represented by a certificate of stock; in this case, by a "seat in the San Francisco Stock and Exchange Board." If, in that case, such certificates could be sold, pledged or mortgaged by the owner, like any other kind or species of property, and a mortgagee thereof would acquire such an equitable lien or interest in the company property as a court of equity would recognize and protect, no reason is perceived why a pledge or mortgage of the "seat" in this case would not confer a like equitable lien, which will be recognized and protected by a court of equity, subject, of course, always to the rules of the association, the conditions of which, as was held by the supreme court of the United States in Hyde v. Woods, 4 Otto, 526, follow the property into whose hands soever it goes. Our conclusion is that the agreement between the parties gave to the plaintiff an equitable lien on the "seat of the defendant in the San Francisco Stock and Exchange Board," subject to the rules and regulations of the association, as security for the repayment of the sum of nine thousand dollars advanced by plaintiff in discharge of the indebtedness of defendant to the members of the association, and that the court below erred in refusing to enforce the same by directing a sale of the seat, subject to the rules and regulations of the association, to satisfy the amount so advanced.

Cause remanded with directions to modify the judgment to accord with these views.

MCKEE, J., and MCKINSTRY, J., concurred.

No. 9,067.

DURKEE *v.* CENTRAL PACIFIC RAILROAD CO.

Department One. [Filed December 23, 1885.

DECLARATIONS OF AGENT—ADMISSIBILITY OF AGAINST PRINCIPAL—RES GESTÆ.—The declarations of a servant or agent, who is employed to perform a duty, are not admissible against the principal, unless they are part of the facts and circumstances of an act happening within the scope of the employment for which it is sought to make the principal liable.

THE SAME—DECLARATIONS OF ENGINEER AS TO CAUSE OF INJURY—NEGLIGENCE.—In an action to recover damages for an injury to a child on a railroad track, alleged to have been caused by the negligence of the engineer of the train, the declarations of the engineer, as to how the accident occurred, made about five minutes after the casualty happened, and about three minutes after the child had been taken from under the engine, are admissible against the principal, as part of the *res gestæ*.

APPEAL from a judgment of the superior court of Alameda county, entered in favor of the plaintiff, and from an order denying the defendant a new trial. The opinion states the facts.

McAllister & Bergin, for the appellant.

H. F. Crane, for the respondent.

MCKEE, J. On the second day of July, 1876, M. W. Durkee, a boy four or five years old, was run over by an engine belonging to and used at the time in the service of the corporation defendant. To recover damages for the personal injuries sustained by the boy on that occasion, this suit was brought by his guardian *ad litem* against the railroad company, on the ground that the injuries were caused by the negligence of the company's engineer while driving the engine, which was attached to a train of cars running on the railroad from San Jose to Niles, in Alameda county.

The evidence in the case tended to show that, on the day of the casualty, the train had arrived on the railroad track at the Warm Springs station at thirty five minutes past four, and according to schedule time it was to leave there at thirty-six minutes past four. When it stopped at the station the nose of the pilot or cow-catcher just came to the south end of a trestle work, which formed part of the railroad track across a creek at the station at a point where a county road, running east and west, crosses the trestle. The train was started on schedule time across the trestle at a speed of about six miles an hour and, at that rate of speed it had moved for about twenty feet at the south end of the trestle, when the engineer, seeing in front of him a human head rising up from between the ties, reversed his engine and called for brakes; but the train could not be stopped until the engine went over the boy. It was stopped within thirty or forty feet on the trestle, and the boy was taken out from under the engine, badly mutilated.

The main issue in the case was, whether the boy was in such a position on the trestle that the engineer, by looking out in front, along the trestle, before starting his train, could have seen him on the trestle and have avoided the casualty, or whether the boy was so concealed under the trestle as to be hidden from sight until he

raised up his head at the approach of the engine, when it was impossible to stop it without going over him.

The jury found that there was no contributory negligence on the part of the boy or of his parents, and that the injuries to the boy were caused by the negligence of the engineer in failing to look out in front along the trestle, to see that it was clear when he started his train to cross it.

The verdict is sustained by the evidence. But it is founded, in part, upon testimony, given by one of the plaintiff's witnesses, of declarations as to how the casualty happened, which were made to him by the engineer about five minutes after the injury to the boy, and about three minutes after he had been taken from under the engine by one of the brakemen, who, at the time of the declarations, had the boy on his arms, in the county road, a short distance from the railroad track.

The declarations, as testified by the witness were: "I asked the engineer, how it happened, and he said: When we started up the train, he was looking up the road, toward Peacock's to see if any one was coming down, and when he turned around he saw the boy and he blew the whistle, but when he reversed the engine it was too late, and he said that they took him out from between the hind trucks of the tender."

The admission of these declarations against the objection and exception of the defendant is assigned as an error.

The declarations of a servant or agent, who is employed to perform a duty, are not admissible against the master or employer, unless they are part of the facts and circumstances of an act happening within the scope of the employment, for which it is sought to make the master liable. The facts and circumstances which grow, as it were, out of the act, or transaction, and are contemporaneous with it, and serve to illustrate its character, are part of it. Thus language used *at the time* of making an assault is part of the assault: McDougal v. Maguire, 35 Cal., 279; and declarations characterizing a transaction made *at the very time* of the transaction are part of it: Gerke v. Steam N. Co., 9 Cal., 257. So declarations voluntarily and spontaneously made by a person, about half or three-fourths of a minute *after* he was shot by another, as to the person who shot him, have been held part of the circumstances of the shooting: People v. Vernon, 35 Cal., 50. But declarations made *after* the fact has been fully consummated are not *res gestæ*: People v. English, 52 Cal., 212; Innis v. Steamer Senator, 1 Cal., 46; Mattee v. Brown, 1 Cal., 224. The code rule upon the subject is: "Where the declarations * * * form part of a transaction which is itself the fact in dispute, or evidence of that fact, such declarations * * * are evidence as part of the transations:" Sec. 1,850, code of civil procedure.

Under this rule the main difficulty in determining the admissibility of the declarations of the engineer in the case in hand arises out of the consideration of the contemporaneousness of the casualty to

the boy and the declarations concerning it. As has been observed: "What lapse of time is embraced in the word 'contemporaneous,' is often a question of difficulty. Perfect coincidence of time between the declaration and the main fact is not, of course, required. It is enough that the two were substantially contemporaneous; they need not be literally so. The declarations must, however, be so proximate in point of time as to grow out, elucidate and explain the character and quality of the main fact, and must be so closely connected with it as virtually to constitute but one entire transaction, and to receive support and credit from the principal act sought to be thus elucidated and explained. The evidence offered must not have the ear-marks of a device or afterthought, nor be merely narrative of a transaction which is really and substantially past:" Ala. S. R. R. Co. v. Hawk, 72 Ala., 117.

It is upon these legal principles that the American courts have generally decided the question of contemporaneousness of fact and declaration.

In Commonwealth v. Pike, 3 Cush., 181, objections were made to the declaration of a woman, who, after having been stabbed in her own room, ran bleeding out of the room, up a flight of stairs and into a room occupied by another, where, having fallen on the floor, she lay until a person outside, who heard her cries, went and brought a watchman, to whom she made the declaration; the objections were overruled and the declaration admitted, and it was held, on appeal, that the time when the declaration was made was so recent after the injury as to justify receiving it as evidence. Where it appears, says the same court, that the declarations "were uttered after the lapse of so brief an interval, and in such connection with the principal transaction as to form a legitimate part of it, and to receive credit and support as one of the circumstances which accompanied and illustrated the main fact which was the subject of inquiry before the jury, they are *res gestæ*:" Com. v. Hackett, 84 Mass., 139.

So in Insurance Co. v. Moseby, 8 Wall., 397, which was an action upon an accident insurance policy, in which the subject of inquiry before the jury was, whether the deceased died from an injury caused by an accident, and the plaintiff in the action gave evidence tending to show that, before the alleged accident, the insured had arisen from his bed about twelve or one o'clock at night, went down stairs and came back, and when he came back he stated "that he had fallen down the back stairs and almost killed himself." It was insisted that this declaration was no part of the *res gestæ*. Exactly what time elapsed between the accident and the declaration does not appear in the case. But the supreme court of the United States held the declaration admissible. "In the complexity of human affairs," says the court, "what is done and what is said are often so related that neither can be detached without leaving the residue fragmentary and distorted. * * * The *res gestæ* are the statements of the cause made by the assured *almost contemporaneously*

with its occurrence, * * * The tendency of recent decisions is to extend, rather than to narrow, the scope of the doctrine."

Coyle v. Hanover R. R. Co., 55 Pa. St., 396, was an action by a peddler, who was run over by a locomotive of the defendant, to recover damages for injuries to himself, his wagon and his goods. On the trial, the plaintiff, against the exception and objection of the defendant, gave evidence of the declarations of the engineer as to the accident; and the supreme court, in passing upon the exception, say: "We cannot say that the declaration of the engineer was no part of the *res gestæ*. It was made at the time of the accident, in view of the goods strewn along the road, by the breaking up of the boxes, and seems to have grown directly out of and immediately after the happening of the fact. The negligence complained of being that of the engineer himself, we cannot say that his declaration made upon the spot, at the time and in view of the effects of his conduct, are not evidence against the company as a part of the transaction itself."

To the same effect will be found Waldele v. N. Y. & H. R. R. Co., 95 N. Y., 284; State v. Garrand, 5 Oregon, 217; Ohio v. M. R. R. Co. v. Porter, 92 Ill., 437.

Applying to the declarations of the engineer elicited in this case the doctrine of those cases, we think the lower court did not err in overruling objections to their admissibility as *res gestæ*. The declarations were voluntary statements, made by the engineer while standing in his engine at the place where the casualty occurred, just after the boy was taken out from "between the hind trucks of the tender," and while he was in view, in the arms of the brakesman, who was carrying him to his father's house. Although they were not literally simultaneous with the casualty, yet they were obviously elicited by it, and following it in such close connection as to be apparently the spontaneous expression of the natural consciousness of it, while the engineer was still under the heat and excitement of the circumstances in which it happened. Made in such circumstances, the declarations cannot be regarded as an afterthought, nor as the expression of a mere narrative of a transaction which had been consummated and become an event of the past. They were made after the injury had been inflicted and the transaction in which the cause of the injury occurred was in process of passing away, but had not wholly passed and was not quite completed. They were, therefore, part of the transaction and admissible as evidence.

We find no prejudicial errors in the record.

Judgment and order affirmed.

ROSS, J., and MCKINSTRY, J., concurred.

DECLARATIONS OF AGENT WHEN ADMISSIBLE AGAINST PRINCIPAL.—See Moore v. Bettis, 53 Am. Dec., 772, and note. Whether the person whose declarations are sought to be introduced against the principal is an agent or not is a question for the jury: Biggerstaff v. Briggs, 3 West Coast Rep., 353.

No. 8,719

HAWKINS ET AL. *v.* HARLAN ET AL.

Department One. Filed December 23, 1885.

MORTGAGE OF VENDEE'S INTEREST UNDER CONTRACT OF SALE—FORECLOSURE.—Defendants F. and B. contracted to sell the land in controversy to one L., who subsequently assigned his contract to the defendant H. H. then executed a mortgage to one McC., who assigned it to plaintiff; Subsequently F. and B. conveyed the land by deed to H., taking at the time from him his promissory note for the purchase price, and a few days afterwards H. executed to them a mortgage on the land to secure the payment of the note. Shortly after, H. reconveyed the land by deed to F. and B. in consideration of the cancellation of the note and mortgage given by him for the purchase price. *Held*, that the proceeds of the sale of the property, in an action brought to foreclose plaintiffs' mortgage should be applied first to the payment of the balance of the purchase money of the land, and next to the payment of the amount due upon the plaintiff's mortgage.

APPEAL from a judgment of the superior court of San Benito county. The opinion states the facts.

Wm. Matthews, for the appellants.

Briggs & Hawkins and *B. B. McCrosky*, for the respondents.

Ross, J. Thomas Flint, L. Bixby and Benjamin Flint, being seized in fee of the land in question, contracted in writing to sell it to one Lane for four thousand five hundred dollars, payable in installments. Lane subsequently assigned his contract to the defendant, Harlan. Harlan then executed a mortgage to one McClosky, and McClosky assigned the mortgage to the plaintiff. Subsequently Flint and Bixby, who meanwhile had succeeded to all of the interest of Benjamin Flint in the property, conveyed the land by deed to Harlan, taking at the time from him his promissory note for the balance of the purchase money, to wit, three thousand seven hundred and one dollars and ten cents, and a few days afterward Harlan executed to Flint and Bixby a mortgage upon the land, to secure the payment of the note; shortly after this, Harlan reconveyed the land by deed to Flint and Bixby, in consideration of the cancellation of the note and mortgage given by him for the balance of the purchase money. In this condition of affairs, the present action was brought by the holder of the mortgage executed by Harlan to McClosky to foreclose it and subject the land in the hands of Flint and Bixby to the payment of the sum due the plaintiff from Harlan.

Flint and Bixby answered in the cause, and also, by cross-complaint, set up the facts above given, and asked, first, that the plaintiff's complaint be dismissed, and, second, that if the land should be sold, the proceeds be applied first to the payment of the balance of the purchase money.

Undoubtedly, the equity of the case demands that Flint and Bixby be paid the balance of the purchase money, before the land, the legal title to which they hold, should go to satisfy the plaintiff's mortgage; for when that mortgage was executed, it only conveyed the interest the mortgagor had in the land—that is to say, the rights conferred upon his assignor by the contract of sale between him, on the one part, and Bixby and the Flints, on the other. In brief, the

right to a conveyance of the title to the land upon the payment of the balance of the purchase money. But it is said that when Flint and Bixby executed the deed to Harlan, the title thereby conveyed inured to Harlan's mortgagee. True, an after-acquired title by the mortgagor ordinarily inures to the benefit of the mortgagee, but this is by operation of the doctrine of relation, which is a fiction of the law adopted solely for the purposes of justice, and will not be given effect when, as in the present case, it would work manifest injustice: Gibson v. Chouteau, 13 Wall., 101; Shay v. McNamara, 54 Cal., 169.

Upon the facts stated in the findings, the land should be sold, and the proceeds applied, after the payment of the costs of the sale, first, to the payment of the balance of the purchase money of the land, and, next, to the payment of the amount due upon the plaintiff's mortgage.

Cause remanded, with directions to the court below to modify the judgment to accord with these views.

McKINSTRY, J., and McKEE, J., concurred.

No. 9,289.

WELLS v. ELLIS.

Department One. Filed December 23, 1885.

PARTNERSHIP—DISSOLUTION BY ASSIGNMENT FOR BENEFIT OF CREDITORS—PROPERTY EXEMPT FROM EXECUTION.—The assignment by partners of the entire firm assets for the benefit of creditors, if valid, operates to dissolve the partnership; and property exempt from execution, subsequently delivered by the assignees to the assignors, is not partnership property, but belongs to them individually. Such transfer of the exempt property does not revive the partnership.

APPEAL from a judgment of the superior court of San Benito county, entered in favor of the defendant. The opinion states the facts.

Briggs & Hawkins, for the appellant.

McCroskey & Hudner and *G. B. Montgomery*, for the respondent.

McKEE, J. On the twentieth of January, 1883, the plaintiff brought the action in hand against the defendant for an accounting and settlement of the affairs of a partnership, alleged to be existing between himself and defendant.

But it was set up as a defense to the action, and proved, and the court finds, that the partnership after it had been formed and operated for some years became insolvent, when, in September, 1882, the copartners made an assignment of all the partnership property "except what by law was exempt from execution," to three persons in trust for the benefit of all creditors of the firm. The assignees accepted the trust, and, after they had qualified according to law, entered upon the discharge of their duties, and executed the trust by distributing the effects and proceeds of the firm *pro*

rata among the creditors. All the creditors except the plaintiff, Wells, accepted the distribution in full satisfaction of all their demands against the firm, and released it from all further liability to them and from all claims on the property.

The object of the partnership was to carry on the business of blacksmithing and farming, the plaintiff Wells, being the blacksmith, and the defendant Ellis, the farmer of the concern. Under the exemption clause of the assignment, Wells claimed to be entitled to the blacksmith tools and Ellis to the farming implements used by them as members of the firm. The claim of each was recognized by the assignees, and they, with the assent of the creditors, delivered over to them the working tools which they respectively claimed.

The receipt of that property, however, neither revived nor continued the partnership, if it was dissolved by the assignment for the benefit of all their creditors, and we think it is clear that the assignment, being valid, operated a dissolution of the firm and divested the partners of their rights in and dominion over the partnership property. Necessarily a valid assignment of all partnership assets by copartners, implies an entire suspension and winding up of all copartnership affairs. By the assignment the copartners were at once deprived of all the means necessary for the transaction of the business of the partnership, and all their interest in the partnership property passed from them to the assignees, in whom title to the property and right of action therefor vested for the benefit of the creditors: Story on Part., section 337; Simmons v. Curtis, 41 Maine, 373; Bank of Tennessee v. Horn, 17 How., U. S., 157.

What was claimed as property exempt from execution was conceded to be such, and on being delivered in satisfaction of the claim it was no part of the partnership property; it belonged to the claimants individually, and not as copartners. When, therefore, the assignors received the exempt property, and the assignees executed the trust of the partnership effects by settling the partnership debts with the creditors, the affairs of the partnership were fully wound up and the partnership ceased to exist.

Judgment affirmed.

ROSS, J., and MCKINSTRY, J., concurred.

ASSIGNMENT OF ENTIRE FIRM ASSETS FOR BENEFIT OF CREDITORS DISSOLVES PARTNERSHIP: Arnold v. Brown, 35 Am. Dec., 296.

No. 7,772.

AGNEW v. KIMBALL.

Department One. Filed December 23, 1885.

SALE—POSSESSION—CONTRADICTORY INSTRUCTIONS.—Judgment reversed for contradictory and misleading instructions as to the effect of a sale of personal property, not in the possession of the vendor, and not accompanied by change in the possession.

APPEAL from a judgment of the superior court of Mendocino county, entered in favor of the plaintiff, and from an order denying the defendant a new trial. The opinion states the facts.

Wilson & Otis and *T. B. Bond*, for the appellant.

T. L. Carothers, *L. D. Latimer* and *C. C. Hamilton*, for the respondent.

ROSS, J. The defendant claimed that the logs, for the conversion of which he was sued, were originally the property of Clark & Rutherford, and were by them sold to one A. H. Rutherford, and by the latter sold to the defendant. They were logs cut in the forests of Mendocino county to be converted into lumber, and were at the time of the sale under which the defendant claims, as well as at the time of the execution sale under which the plaintiff claims, scattered for a distance of several miles along the stream of water by which they were to be conveyed to the mill.

The court below instructed the jury:

"If the jury believe from the evidence that there was a sale of the logs by Clark & Rutherford or A. H. Rutherford to the defendant, but that such sale was not followed by an immediate delivery and by an actual and continued change of possession thereof, then such sale was void as against the plaintiff.

"If the evidence shows that the owners of the logs sold them for a valuable consideration to Kimball and that the logs were not in actual possession of the sellers at the time of sale, it was not necessary that the sale should have been accompanied by an immediate delivery and followed by an actual and continued change of possession to make the sale good and valid and to transfer the title of them to Kimball; and in connection with this I will say that the sale without such immediate possession was a good sale, as between the seller and buyer, but might not be good as against creditors. I don't say that it would not, but it might not be.

"I charge you that before a sale of the logs could have been made to Kimball, the defendant, the party selling to him must have actually delivered them to the defendant in order for the sale to be good against the creditors of the party selling."

These instructions were clearly contradictory and misleading.

Judgment and order reversed and cause remanded for a new trial.

MCKEE, J., and MCKINSTRY, J., concurred.

CONTRADICTORY INSTRUCTIONS ARE ERRONEOUS.—Baxter v. Lockett, 6 West Coast Rep., 220; but will not warrant a reversal if the losing party was not prejudiced: Bassett v. Inman, 2 West Coast Rep., 534; and will not be considered on appeal unless excepted to at trial: Sierra U. W. Co. v. Baker, 7 West Coast Rep., 734.

No. 9,306.

BOWIE *v.* BORLAND.

Department One. Filed December 23, 1885.

REFERENCE—ORDER FOR JUDGMENT—ENTRY OF JUDGMENT BY CLERK.—A stipulation for reference authorized the referee to determine all issues, and provided that upon the filing of his report judgment should be thereupon entered in accordance therewith. In the order for reference, the court directed judgment to be entered in accordance with the referee's report. *Held*, that upon the filing of such report, the clerk had authority to enter judgment without any further order of court.

APPEAL from an order of the superior court of the city and county of San Francisco. The opinion states the facts.

H. P. McKoon, and *George W. Towle, Jr.*, for the appellant.

McAllister & Bergin, for the respondent.

ROSS, J. The parties to this suit stipulated to its reference, with power in the referee to determine all the issues in the cause, of fact as well as law, and further, "that upon the filing of said referee's report, judgment shall be thereupon entered in this action by the above superior court, in accordance therewith." Upon the stipulation the court made an order of reference empowering the referee to hear and determine all of the issues, directing him to report his findings, and further ordering "that upon the filing of said referee's report, judgment be entered in this action in accordance therewith." The case was duly tried before the referee named, who reported his findings and judgment, and upon the filing of which the judgment was entered by the clerk. The court subsequently, on motion of the losing party, made an order vacating the judgment so entered, upon the ground that the clerk was not authorized to enter it. The appeal is from that order.

If it be admitted that the entry of judgment by the clerk does not follow, of course, upon the report of the referee where the reference to him is to report upon the whole case, yet, in this case, express authority was given the clerk in the order of the court directing the entry of judgment in accordance with the referee's report.

Order reversed.

MCKEE, J., and MCKINSTRY, J., concurred.

No. 9,185.

IN RE BAUM.

Department One. Filed December 23, 1885.

INSOLVENCY—CREDITORS RESIDENT OF STATE—ASSIGNMENT BY NON-RESIDENT.—Assignments of claims, made by non-resident creditors to persons residing in this state, without consideration, and solely to enable such persons to become petitioning creditors in a proceeding in involuntary insolvency against the debtor, cannot make of such assignees "creditors, residents of this state," within the meaning of section 8 of the insolvency act of 1880.

APPEAL from an order of the superior court of the city and county of San Francisco, adjudging the appellant an insolvent.

Naphtaly, Freidenrich & Ackerman, for the appellant.

Sawyer & Ball, Lloyd & Wood and *Mastick, Belcher & Mastick*, for the respondent.

ROSS, J. Section 8 of the insolvent act of 1880, provides: "An adjudication of insolvency may be made on the petition of five or more creditors, residents of this state, whose debts or demands accrued in this state, and amount in the aggregate to not less than five hundred dollars; provided, that said creditors, or either of them, have not become creditors by assignment within thirty days prior to the filing of said petition:" Statutes 1880, p. 84.

The real question in the case is whether assignments made by non-resident creditors to persons residing in the state, without consideration and solely to enable such persons to become petitioning creditors, can make of such assignees "creditors, residents of this state," within the fair meaning of the statute. The legislature has seen fit to enact that only creditors resident of the state, shall institute such proceedings, and for the courts to hold that mere colorable transfers of claims to persons residing within the state will make such persons "creditors resident of the state," would be to sanction a plain evasion of the statute. Apart from the presumption which must be indulged, that when the legislature speaks of creditors it means *bona fide* creditors, the provision of the proviso would seem quite clearly to indicate an intention on the part of the law making power to guard against assignments, even in good faith and for value, being made for the purpose of commencing involuntary proceedings.

Judgment reversed and cause remanded.

MCKINSTRY, J., and MCKEE, J., concurred.

No. 9,270.

SMITH v. ROBARTS.

Department One. Filed December 23, 1885.

POSSESSION OF LAND UNDER MISTAKE—DIVISION LINE.—Possession of land, by coterminous proprietors, under a mutual mistake as to the division line, has no effect upon their legal rights; it is not adverse or conclusive against the assertion of any existing rights upon the true title.

THE SAME—VERBAL AGREEMENT AS TO DIVISION LINE—STATUTE OF FRAUDS.—A verbal agreement between such proprietors to have the true line surveyed and to abide by the line thus established, is binding. Such agreement is not within the statute of frauds.

APPEAL from a judgment of the superior court of Humboldt county, entered in favor of the defendant, and from an order denying the plaintiff a new trial. The opinion states the facts.

J. J. DeHaven, and *G. W. Hunter*, for the appellant.

S. M. Buck, Cope & Boyd and *P. F. Hart*, for the respondent.

MCKEE, J. The case originated in an action commenced in a justice's court to recover damages for a trespass on real property. To the complaint in the action there was filed a verified answer, which presented issues involving title and possession of the property, and the justice transferred the action to the superior court, where, trial being had, judgment was entered for defendant.

The contention is that the judgment is erroneous, because the decision on which it was given is not sustained by the evidence.

But the evidence shows, and the court finds, that plaintiff and defendant were coterminous proprietors of two eighty-acre tracts of land in the northwest quarter of section 3, township 2 north, range 2 west, Humboldt meridian—plaintiff being owner and in possession of the southwest quarter, and defendant owner and in possession of the southeast quarter, of the quarter section; that the defendant entered upon the land and dug post-holes thereon for a divisional fence between the two tracts, the digging of these holes constituting the trespass of which the plaintiff complained; and that the true divisional line, run according to the United States survey, located the strip of land on which the holes were dug within the tract belonging to the defendant. The line as surveyed was therefore the true divisional line.

But it also appeared in the evidence that, in the year 1871, the grantors of the respective parties established a different line, on which they built a fence, partly of posts and rails and partly of brush, which they, at the time, and for several years thereafter, recognized as the line; and, according to that line, the *locus in quo* belonged to the plaintiff. Those who established it, however, were never satisfied that the fence was on the true line; but they recognized it as on the line for several years until they both ascertained, by tape measurement, that it was not; and then, as the plaintiff's grantor testified, "When ascertained that the division made by me and Mr. Cris, the grantor of defendant, gave me more than an equal division, I was willing that it should be set back so as to make it equal." The fence, however, was allowed to stand, and the grantor of the defendant continued to cultivate up to it until 1880, when he transferred to the defendant his title to the southeast quarter of the quarter section; and the defendant, after the acquisition of title, verbally agreed with the plaintiff to have the line surveyed and to abide by the line established by the survey. Under that agreement the line was surveyed in 1881, and the defendant built his house upon it in 1882.

In Biggins v. Chapman, 59 Cal., 112, and Cooper v. Vierra, 59 Cal., 282, we held that the location of a doubtful division line, by agreement of coterminous proprietors, which has been acquiesced in for a greater length of time than that prescribed by the statute of limitations to bar a right of entry on land, was conclusive evidence of the correctness of the line. Sneed v. Osborne, 25 Cal., 619, is to the same effect. And in Columbet v. Pacheco, 48 Cal., 395, it was held that mere acquiescence, without controversy, in a fence line

which was renewed from time to time, by the coterminous owners, for twenty years, estopped both from denying that it was the true line.

But, in the case in hand, acquiescence in the fence line as the true divisional line of the respective tracts of land was not considered by the grantors of the parties in the case as binding between them. Both agreed and recognized the fact that it was a mistake, and that any portion of the land of either tract which was held by the other was held under a mutual mistake. A possession of land held under a mutual mistake has no effect upon legal rights; it is not adverse or conclusive against the assertion of any existing rights upon the true title: Irvine v. Adler, 44 Cal., 559; Shields v. Haley, 61 Cal., 159; Allen v. Read, 51 Cal., 362. Such a possession neither vests nor divests title to real property.

The verbal agreement between the plaintiff and defendant to have the true line surveyed and to abide by the line established by the survey was therefore binding. The fixing of a boundary line is not within the statute of frauds: Kincaid v. Dormey, 47 Mo., 337; Kellum v. Smith, 65 Penn. St.; 86; Orr v. Hudley, 36 N. H., 575.

There is no error in the record.

Judgment and order affirmed.

ROSS, J., concurred.

MCKINSTRY, J. I concur in the judgment.

No. 9,336.

DOANE *v.* BARBER.

Department One. Filed December 23, 1885.

FINDINGS—VALIDITY OF ASSESSMENT—FACTS IN ISSUE.—Where the pleadings put in issue the validity of an assessment, any fact or facts going to show that no valid assessment was ever levied, are within the issues, and properly included in the findings.

APPEAL from a judgment of the superior court of the city and county of San Francisco, entered in favor of the defendant.

J. M. Wood, for the appellant.

Doyle, Barber & Scripture, for the respondent.

ROSS, J. It was contended on behalf of the plaintiff that the third, fourth and fifth findings of fact, on which the judgment given below rests, are not within the issues made by the pleadings, and cannot, therefore, be regarded. But the pleadings put in issue the question of assessment or no assessment: City and County of San Francisco v. Eaton, 46 Cal., 100. And any fact or facts going to show that no valid assessment was ever levied were, therefore, within the issues made by the pleadings.

Judgment affirmed.

MCKEE, J., and MCKINSTRY, J., concurred.

No. 8,732.

BLISS *v.* CARROLL.

In Bank. Filed December 23, 1885.

WAREHOUSE RECEIPTS—BONDED WAREHOUSE—BRANDY STORED IN NAME OF DISTILLER.—Plaintiff was the owner of the brandy in controversy. It was manufactured for him by one B., a licensed United States distiller, and in order to delay payment of the revenue tax, was stored by him in a United States bonded warehouse, controlled and regulated by the act of congress of March 3, 1877, and the special treasury regulations of May 15, 1877. Such laws require the brandy to be stored in the name of the distiller, but do not require that the distiller shall be the owner. The warehouse receipt was issued to B. in his own name. Subsequently B., without authority, sold the brandy to the defendant, and transferred the receipt to him. The defendant was a *bona fide* purchaser for value and without notice. *Held*, that the plaintiff was entitled to a return of the property, upon paying to the defendant the amount of the warehouse charges and the government tax paid by him.

APPEAL from a judgment of the superior court of the city and county of San Francisco, entered in favor of the defendant. The opinion states the facts.

Latimer & Morrow and *Frederick S. Stratton*, for the appellant.

George Cadwalader, for the respondent.

ROSS, J. The findings show the plaintiff Bliss to be the true owner of the brandy in controversy. It was manufactured by one Belden, who was a licensed United States distiller, for the assignor of the plaintiff, for a certain sum per gallon. The brandy was made of grapes belonging to plaintiff's assignor, who, in order that the payment of the government tax of ninety cents per gallon might be delayed, in accordance with the laws of the United States, caused Belden to store it in a United States bonded warehouse. The law of the United States in respect to the matter, required that such brandy should be stored in the name of the distiller, and it was accordingly done, Belden receiving a warehouse receipt therefor in his name. Subsequently, without any authority from Bliss, and without his knowledge, Belden sold the brandy to the defendant Carroll, and transferred the warehouse receipt to him, and Carroll had another issued in his own name. Carroll paid Belden value for the brandy, and purchased it in good faith, and without any notice of any interest therein on the part of Bliss. As soon as the latter learned of the sale by Belden to Carroll, he tendered the amount of the government tax due on the brandy, together with the charges of the warehousemen, and demanded of the defendants that the brandy be transferred to his name on the records of the warehouse, and on the records of the office of internal revenue, and be delivered to plaintiff, or his order, upon the payment of the taxes and charges—all of which was refused. Afterward Carroll paid the government tax and removed the brandy.

The warehouse in which the brandy in question was stored was not an ordinary warehouse under the general commercial system of the country, but was a special bonded one, controlled and regulated by the act of congress of March 3, 1877, and special treasury regulations of date May 15, 1877. The law governing the matter—

of which all persons are bound to take notice—requires that all grape brandy placed therein shall be stored in the name of the distiller, but does not require that the distiller shall be the owner. He may or may not be. And of that fact all persons are bound to take notice. The plaintiff did not intrust Belden with the brandy for the purpose of sale, or transfer, but it was stored in the latter's name because the law said it should be so stored. We are of opinion that the facts of the case do not bring it within any exception to the general rule, that a vendee acquires only the title of his vendor, and that the true owner can recover the possession of his property in the hands of a *bona fide* purchaser.

But, as defendant Carroll was required to pay the government tax and the warehouse charges upon the brandy, it is but right that a refunding of the amounts so paid be imposed as a condition to the recovery by plaintiff.

Judgment reversed and cause remanded, with directions to the court below to render judgment upon the findings in plaintiff's favor against defendant Carroll, for a return of the property or its value, upon the payment or tender by plaintiff to said defendant of the amount of such tax and charges.

MORRISON, C. J., SHARPSTEIN, J., MYRICK, J., MCKINSTRY, J., and THORNTON, J., concurred.

WAREHOUSEMAN'S RECEIPT IS NOT NEGOTIABLE in absence of statutory enactment, and passes no better title that vendor has: Solomon v. Bushnell, 2 West Coast Rep., 818. As to the effect of a warehouseman's receipt, see Smith v. Picket, 50 Am. Dec., 385.

No. 9,314.

YOUNGER v. BOARD OF SUPERVISORS.

Department One. Filed December 23, 1885.

VOLUNTARY PAYMENT OF ILLEGAL TAX—NO ACTION LIES TO RECOVER.—A payment for taxes, based upon an illegal assessment, made in order to prevent the property assessed from being returned delinquent, is a voluntary payment, and cannot be recovered back by action.

THE SAME—POWER OF SUPERVISORS TO REFUND ILLEGAL TAX—MANDAMUS. — The power granted to the board of supervisors of a county, by section 3,804 of the political code, to refund taxes illegally or erroneously collected, is judicial and not ministerial; and after such board has heard and refused a petition for the refunding of a tax illegally collected, it cannot be compelled, by mandamus, to act contrary to its prior determination.

APPEAL from a judgment of the superior court of Santa Cruz county, entered in favor of the defendant. The opinion states the facts.

Chas. B. Younger, for the appellant.
Lesser & Hall, and *Wm. T. Jeter*, for the respondent.

MCKEE, J. Application for a writ of mandate.

The petitioner shows that, on the ninth of January, 1883, he applied to the board of supervisors of Santa Cruz county, on a verified petition, for an order upon the county treasurer of the county, for payment of the sum of two hundred and sixty-five dol-

lars, claimed to have been illegally collected from the petitioner by the tax collector of said county; "that the petition came on regularly for hearing before, and was heard by, said board of supervisors," and that said board, after hearing the petition and the proofs given in support of the facts stated therein, denied the same.

The moneys which the petitioner claims to have been illegally collected from him were collected by the tax collector for taxes levied for the state, county and school purposes, on an assessment to the petitioner, upon the assessment-roll of Santa Cruz county for the year 1880, of the sum of twelve thousand four hundred and eighty-one dollars, money belonging to him on general deposit in the Santa Cruz Bank of Savings and Loan. Being assessed for that sum of money in connection with other property, the petitioner claimed the assessment of the money to him was illegal, because the same money was assessed on the same assessment-roll to the bank, for the same taxable purposes, for the same year, and he applied to the county board of equalization to equalize his assessment by deducting from it the money on deposit in the bank, but it refused his application, "and on the last day for the payment of the taxes before delinquency, he had to pay, and did pay, to the tax collector the taxes on said money, in order to prevent his property from being returned delinquent."

The payment was voluntarily made in the year 1880. Being voluntarily paid, the money was not recoverable back by action; and the petitioner had no claim for it which he could enforce against the county.

But it is said to be immaterial whether the payment was voluntary or compulsory, because section 3,804 of the political code makes it the duty of the board of supervisors to order refunded taxes erroneously or illegally collected. The section reads: "Any taxes, per centum, and costs, erroneously or illegally collected, may, by order of the board of supervisors, be refunded by the county treasurer."

The power thus granted to boards of supervisors is judicial, not ministerial; and when a board is called upon in an application before it under that section of the code, it may, in the exercise of its powers, make a refunding order only for such taxes, etc., as may have been illegally or erroneously collected. For that purpose it has the right to hear and determine the application. Such proceeding is in the nature of an action for relief: Dickey v. Polk county, 58 Iowa, 28; and after the board in which the proceeding is pending has heard and determined, it cannot be mandamused; for a tribunal exercising judicial powers cannot be compelled how to act.

Judgment affirmed.

ROSS, J., and MCKINSTRY, J., concurred.

ILLEGAL TAX VOLUNTARILY PAID CANNOT BE RECOVERED BACK.—Salt Lake City v. Hollister, 2 West Coast Rep., 441; Benson v. Monroe, 54 Am. Dec., 716, and note.

WEST COAST REPORTER.

WHOLE NO. 106. JANUARY 7, 1886. VOL. VIII. NO. 10.

SUPREME COURT OF OREGON.

STATE *v.* ABRAMS.

March Term, 1884.

MURDER — INDICTMENT — SURPLUSAGE ALLEGATIONS. — An indictment for murder charged the defendant with having killed the deceased "purposely and of deliberate and premeditated malice," by "unlawfully and feloniously shooting him," etc. *Held*, that the crime of murder was sufficiently alleged; that the words "unlawfully and feloniously" referred solely to the shooting, and did not affect the preceding allegation as to the intent with which the killing was done; and that such words were surplusage, and might be disregarded.

THE SAME — RECORD OF ARRAIGNMENT. — A record which recites that the defendant "personally appeared in open court and was duly arraigned on said indictment," sufficiently shows an arraignment.

TRIAL — SETTING DAY FOR — DEFENDANT NEED NOT BE PRESENT. — The appointment of a day for the trial of a criminal prosecution is no part of the trial, and may be made in the absence of the defendant.

APPEALS IN CRIMINAL CASES — TRANSCRIPTS — IMPANELING OF GRAND JURY. — Under sections 212 and 241 of the criminal code, transcripts on appeal in criminal cases need not contain a record that a grand jury was impaneled, or that a foreman was appointed at the term of court at which the indictment purports to have been found.

THE SAME — MISCONDUCT OF COUNSEL — NEW TRIAL. — No objections to proceedings in the lower court can be heard on appeal which are not based on alleged error in judicial action. If abuses of counsel have occurred during the trial, without the fault of the court or of the party complaining, the injured party has his remedy by motion for a new trial. But he cannot claim a reversal of the judgment on account of such irregularities, which have never been submitted to the trial court for its determination.

DEFENDANT WITNESS IN HIS OWN BEHALF — CROSS-EXAMINATION AND IMPEACHMENT OF. — Where a defendant in a criminal case avails himself of the privilege of becoming a witness in his own behalf, he subjects himself to the same rules of cross-examination as any other witness. And if, on such examination, he denies having made certain statements, in conflict with his declarations on the trial, the prosecution may give evidence to the contrary, for the purpose of impeaching his testimony. The evidence of the impeaching witnesses is admissible if the declarations testified to by them are the same in substance with the words used in the impeaching questions.

THE SAME — EVIDENCE TO TEST MEMORY AND FAIRNESS OF WITNESS. — To test the fairness and memory of an impeaching witness, everything that was said or done during the conversation testified to is a proper subject of inquiry on cross-examination.

EXPERTS — OPINION AS TO MENTAL CONDITION. — A non-expert witness cannot testify as to his opinion of another's mental condition, without giving the facts upon which it is founded. Nor can an expert testify as to a person's mental condition "under exciting circumstances," unless it be shown that he has seen him under such circumstances.

INTOXICATION — EVIDENCE OF. — The declarations and acts of a party at a given time are admissible to prove whether or not he was intoxicated.

EVIDENCE — PRESUMED TO BE OFFERED FOR ADMISSIBLE PURPOSE. — Where evidence is admissible for one purpose and not for another, it will be presumed, on appeal, to have been offered for the purpose which will render it admissible.

CONVICTION—REASONABLE DOUBT—MORAL CERTAINTY.—A conviction from the facts in evidence of the defendant's guilt to a reasonable and moral certainty is a conviction beyond a reasonable doubt.

DELIBERATE USE OF WEAPON DEFINED.—A definition that a deliberate use of a deadly weapon is "an intentional use; a use that is the result of a resolution, purpose, or design, formed in the mind and reflected upon, and not done in self-defense; it is only necessary that it be the act of the mind when the mind has had time to act without heat or passion"—is sufficiently certain and correct.

APPEAL from Lane county. The opinion states the facts.

Strahan & Bilyeu and *Weatherford & Blackburn*, for the appellant.

E. G. Hursh, district attorney, and *George B. Dorris*, for the respondent.

WATSON, C. J. The appellant Abrams was indicted by the grand jury of Lane county at the April term of the circuit court for said county, in the present year. The body of the indictment is as follows: "H. W. Abrams is accused by the grand jury of the county of Lane, in the state of Oregon, by this indictment of the crime of murder, committed as follows: The said H. W. Abrams, on the nineteenth day of January, A. D. 1883, in the county of Lane and state of Oregon, then and there being, purposely and of deliberate and premeditated malice, killed J. G. Brownlee, by then and there unlawfully and feloniously shooting him, the said J. G. Brownlee, with a revolving pistol," etc.

Upon this indictment Abrams was tried, found guilty of murder in the second degree, and sentenced to imprisonment for life. The appeal is from this judgment. He claims, in the first place, that the indictment only charges him with manslaughter, and that it will not support his conviction for the higher crime of murder in the second degree. This view is based wholly on the effect of the employment of the words "unlawfully and feloniously" in the indictment. But evidently these words refer solely to the act of "shooting," and qualify it alone. They do not affect the preceding allegation as to the particular intent with which the killing was done. Indeed, the "unlawful and felonious" nature of the "shooting," so averred, is not only entirely consistent with the previous charge of purpose, malice, deliberation, and premeditation, but is included in it; and while unnecessary, it cannot have the effect of reducing the grade of the crime as previously charged. It is plainly, we think, an instance of surplusage, which does not vitiate.

In the second place, he contends that it does not appear from the record that all the requirements of a legal arraignment under the statute were complied with in the court below. It is true, the record in this instance does not show an observance of all such requirements in detail; but it does recite that he "personally appeared in open court and was duly arraigned on said indictment," etc. And this has been held a sufficient record of arraignment by this court: State v. Lee Ping Bow, 10 Or. 27.

The next objection is, that the court below, on April 19, 1883, made an order during his absence setting the trial for a specified future day. But the appointment of a day for the trial to begin was no part of the trial, and was not a matter upon which he could have insisted to

beheard, even if he had been present. The objection is clearly untenable.

There is still another objection based upon the alleged defectiveness of the record. It is that it does not appear from the record of the case brought here on the appeal "that any grand jury was impaneled, sworn, and charged" at the term of court at which the indictment purports to have been found, as prescribed by the criminal code, or that any foreman was appointed. But this is easily answered. The transcript on appeals in criminal as well as civil cases is a certified copy of the judgment roll, with copy of the notice of appeal, etc.: Crim. Code, sec. 241. What papers shall compose the judgment roll in criminal cases is prescribed by section 212, and the record of the proceedings specified in the objection is not among them.

Several objections were made and exceptions saved, at the trial, by appellant's counsel, on the ground of remarks made by counsel for the prosecution to the jury upon matters not in evidence. Some of these remarks, attributed to Mr. Dorris, were undoubtedly improper, and can hardly be condemned with too much severity. But however reprehensible, there is one insuperable obstacle to their being considered here as ground for reversal. They involve no error of the court below. We have announced this principle before: State v. Anderson, 10 Or. 448; and we now lay it down as a rule to which there can be no exceptions, that no objection to proceedings in the court below can be heard in this court which is not based on alleged error in judicial action on the part of the lower court. If abuses of the nature complained of in this instance, occurring during the progress of a cause through the lower court, without fault on its part, or want of skill or attention on the part of the complaining party, prevent a fair trial, he has his remedy under subdivision 1 of section 232 of the civil code (which applies in both civil and criminal cases alike), making provision for new trials. But he cannot come here in the first instance and claim a reversal of judgment on the ground of irregularities, which have never been submitted to the lower court for its determination. In the only instance in which the question as to the admissibility of comments made by counsel for the prosecution to the jury was ruled upon by the court below and exception taken by the appellant, we are satisfied there was no error. Mr. Burnett for the defense had said in his address to the jury: "That the prosecution had not been able to call a single witness to show that defendant's character was bad." Mr. Mallory for the prosecution said, in reply: "Counsel had no right to make such statement. If counsel had put the prisoner's character in issue instead of its appearing bright and without a blemish, we might have shown it was covered with dark and damning spots." This was simply argument in reply to Mr. Burnett, and not the assertion of any new fact outside of the record; and in our judgment it was not objectionable on this ground.

On the trial, Abrams was examined as a witness for the defense, and testified generally to what transpired at the meeting between Brownlee and himself, during which the homicide occurred. Upon his cross-exam-

ination he was asked certain questions, with a view to his impeachment by proof of contradictory statements made previous to the trial. His counsel objected to the questions being put, on the ground that the evidence sought was in the nature of confessions, and therefore original evidence, which the prosecution had no right to extort from him on cross-examination, or offer in rebuttal. But the objection was overruled and the point saved by an exception. Abrams having denied making the contradictory statements imputed to him by such questions, the impeaching witnesses, Samuel Hauser and Clay Zumwalt, were called in rebuttal, and permitted to testify concerning the same against the same objection. The objection was good in neither instance. Section 166 of the criminal code, as amended by the act of October 25, 1880, makes the accused in all criminal trials and proceedings a competent witness at his own option; and when he does avail himself of this privilege, he subjects himself to the same rules of cross-examination as any other witness: Laws 1880, 28; State v. Ober, 52 N. H. 459; S. C., 13 Am. Rep. 88; Connor v. People, 50 N. Y. 240. The additional grounds of objection to the testimony of Hauser and Zumwalt are equally untenable. It was not essential to the admissibility of their testimony that they should be able to testify that Abrams used the specific and particular words given in the impeaching questions. If the declarations testified to by them were the same in substance, that was sufficient: Patchin v. Insurance Co., 13 Id. 268.

W. J. Bramwell was called by the defense to prove contradictory statements made by C. C. Baber, a witness for the prosecution. After testifying in chief in respect to such statements, he was asked the following questions on cross-examination: "State what he, Baber, did say about the shooting at the end of the counter, and going down the aisles?" And further on: "Did he have a diagram before him at the time of the conversation?" The court ruled that the questions should be answered, and appellant's counsel took an exception. The contradictory statements related to the same shooting, and it is difficult to conceive of any valid objection to requiring the impeaching witness to state all that Baber said on the subject at the time. Nor would the right of cross-examination end here. To test the memory and fairness of the impeaching witness, everything that was said or done during the the conversation testified to was a proper subject of inquiry on cross-examination. The prosecution also asked this witness on cross-examination if he had "told any person, or any of the attorneys for the defendant, about this conversation;" and asked other witnesses for the defense similar questions on cross-examination; and the court required the questions to be answered over the appellant's objections. There was no error in these rulings. However slight and unsatisfactory, such evidence, if elicited, would tend to show the state of the witness's feeling towards the defense, and have some bearing upon the question as to his bias. It is a common, and in our judgment a perfectly legitimate, method of affecting a witness's credit in judicial trials.

During the trial, the defense called J. F. Waters as a witness, and

after showing by his examination that he was an "intimate" personal acquaintance of Baber—who was an eye-witness of the shooting of Brownlee by Abrams, and had testified in regard thereto on behalf of the prosecution—asked him this question: "Do you know the mental capacity of C. C. Baber under exciting circumstances, for receiving and retaining facts, and of afterwards relating what transpired under such circumstances? and if so, please state what it is." The question was objected to as incompetent, and excluded by the court. We think its exclusion was proper. If such evidence could be deemed admissible in any case—upon which we need express no opinion—it is quite evident that no foundation for its introduction was laid in the present instance. The witness was not offered as an expert, and yet it was sought by the question to elicit his opinion without the facts upon which it had been formed. But if the witness had been shown to be an expert, still he should not have been allowed to testify as to his opinion, as it had not been shown that he had ever seen Baber "under exciting circumstances" of any kind, much less circumstances similar to those attending the shooting of Brownlee. The same question was propounded to other witnesses for the defense, under the same circumstances, and ruled out in the same manner.

Abrams having testified that his hat was injured in a particular manner in an encounter with Brownlee immediately before the shooting, which was on the nineteenth day of January, 1883, the prosecution was permitted to prove by Emmet Butler, in rebuttal, against the objection of the appellant, that he saw the appellant and several others engage in a scuffle during the month preceding, in which the appellant's hat was injured in a similar manner, to some extent, as he had testified to its being injured in the encounter with Brownlee. The witness also testified that he did not know whether it was the same hat, but that it was the same kind of hat. The material ground of objection is, that the identity of the hat was not established so as to make the testimony admissible. But we think there was evidence enough on this point to justify the submission of the matter to the jury, and consequently that there was no error in so doing.

The defense also introduced evidence to show that Brownlee was intoxicated at the time of the shooting, and the prosecution in rebuttal offered W. S. Lee, who testified to having seen Brownlee only a few minutes before he was killed, and that he was not drunk at that time. The prosecution was then allowed to prove by the witness, against the objections of the appellant, what Brownlee did and said at the same time. Such evidence was competent on the question as to whether Brownlee was intoxicated at the time of the shooting or not. And such was evidently its object. These were facts upon which the jury were as competent to form an opinion as to Brownlee's intoxication as the witness was himself. The prosecution also called J. H. Bowerman, in rebuttal, who testified that he had lived in Oregon three and a half years; that he first knew Brownlee in Iowa, and knew something of the effect of liquor on him; and that he shipped with him at Council

Bluffs. The prosecution was then allowed to ask him the following questions, against the appellant's objections: "How long were you from the time you left Omaha until you reached Portland?" Ans. "About seven days." "Did you see him drink in this town?" Ans. "Not any." The prosecution had no right to introduce such evidence to rebut the evidence offered by the defense to show that Brownlee was intoxicated at the time of the shooting. But Abrams's defense was, that he killed Brownlee in self-defense, and some evidence to this effect was introduced.

Upon this basis a considerable amount of evidence had been introduced by the defense to show that Brownlee was intoxicated at the time of the shooting, and that when he was in that condition he was habitually boisterous, quarrelsome, and dangerous. The prosecution had a right to rebut this evidence as to conduct and disposition on Brownlee's part during such periods by proof coming from those who knew him, and had had suitable opportunities for observing his conduct and learning his disposition when intoxicated, that he was not boisterous, quarrelsome, or dangerous when in that state; and taking all the record before us, shows in regard to the testimony of this witness, it appears quite as likely that it was offered for this purpose as the other, and we must therefore presume that such was the case.

We have examined the instructions given to the jury by the court, and excepted to by the appellant, with a good deal of care, and feel quite sure they afford no sufficient ground for a reversal of the judgment. What is said therein as to what constitutes reasonable doubt may be summed up as expressing the idea, that to be convinced from the facts in evidence of the appellant's guilt to a reasonable and moral certainty was to be convinced beyond a reasonable doubt of such fact of guilt. And this we deem entirely correct and fairly intelligible. The definitions of deliberation and premeditation embodied in such instructions are of no moment in the present state of the case, as the crime of which appellant has been convicted does not involve either as a necessary element. And the court's definition of the deliberate use of a deadly weapon, we think, is certainly correct. It is as follows: "A deliberate use of a deadly weapon is an intentional use; a use that is the result of a resolution, purpose, or design, formed in the mind and reflected upon, and not done in self-defense. It is only necessary that it be the act of the mind when the mind has had time to act without heat or passion."

The judgment of the circuit court must be affirmed.

WHEN DEFENDANT IS WITNESS IN OWN BEHALF, the court may call the jury's attention to such fact, and instruct them to consider his interest in the result, in weighing his testimony: People v. Wheeler, 2 West Coast Rep. 70; People v. Callaghan, 5 Id. 942; People v. O'Neil, 7 Id. 361. In California, under section 1323 of the penal code, the cross-examination of the defendant is confined to the matters testified to in the examination in chief. If the court permits the cross-examination to assume a wider scope, the constitutional right of the defendant is violated, and a new trial must be had: People v. O'Brien, 6 Id. 245.

OPINIONS OF NON-EXPERT AS TO MENTAL CONDITION are not admissible, in Oregon, except under the circumstances provided for in section 696 of the civil code. As to when the opinions of non-experts are admissible, see Morse v. Crawford, 44 Am. Dec. 349, and cases cited in note; Potts v. House, 50 Id. 329. Such opinion is generally admissible if accompanied by the facts on which it is founded: Sutton v. Reagan, 33 Id. 466; Clark v. State, 40 Id. 481; Morse v. Crawford, 44 Id. 349; Maxwell v. Harrison, 52 Id. 385. As to the admissibility of the opinions of experts, see State v. Marler, 36 Id. 406; McAllister v. State, 52 Id. 180; Freeman v. People, 47 Id. 216; Commonwealth v. Rogers, 41 Id. 458; Clark v. State, 40 Id. 481.

REASONABLE DOUBT, WHAT CONSTITUTES: People v. Dewey, 5 West Coast Rep. 812; Commonwealth v. Webster, 52 Am. Dec. 711, and note.

STATE v. JUSTUS.

October Term, 1883.

CRIMINAL LAW—GRAND JURY—PRESENCE OF STRANGER BEFORE—OBJECTION UNAVAILING AFTER TRIAL.—The fact that a person other than the district attorney was present before the grand jury for the purpose of assisting them in the examination of witnesses and in framing the indictment, while highly improper, cannot be taken advantage of after trial and verdict upon a motion for a new trial.

THE SAME—NON-PROFESSIONAL WITNESSES—EVIDENCE AS TO RESULT OF EXPERIMENTS.—The danger of permitting non-professional witnesses to prove, through the instrumentality of experiments, matters not within the range of their observation and experience, and of which they are supposed to be incompetent to deal, commented upon. And in the present case, where the subject under examination was the appearance and characteristics of near gun-shot wounds upon the human body, the result of experiments made by non-professional witnesses upon pasteboard targets held inadmissible.

MURDER AND MANSLAUGHTER—ACCIDENTAL HOMICIDE.—Whatever may be the difference as to degree of homicide, a party whose negligence causes the death of another is responsible, whether the business in which he is engaged was legal or illegal. If the business was of such a character as to be felonious, the offense is murder. But even where the business is perfectly legal, negligence, in the discharge of it, when producing homicide, is manslaughter. To this general rule there are exceptions, as where an act, careless in itself, is committed, with fatal results, under circumstances or at a place from which it might be inferred that no injury could happen from the carelessness of the party acting.

APPEAL from Jackson county. The opinion states the facts.

R. Williams, B. F. Dowell, and *J. R. Neil,* for the appellants.

P. P. Prim, for the respondent.

LORD, J. The appellant was indicted by the grand jury of Jackson county for the crime of murder in the first degree, committed by shooting and killing William Justus, his father; for which he was tried at the June term of the circuit court of that county, and found guilty as charged, and sentenced to be hanged. From that judgment he brings his appeal to this court. Among the errors relied upon to question the correctness of that judgment and secure a new trial is the fact, as disclosed by the record, that a person, not authorized by law, was present before the grand jury, at the request of the district attorney, for the purpose of assisting them in the examination of witnesses, and in framing the indictment. That any person other than the district attorney should be permitted to be present during the sittings of the grand jury must be admitted to be highly improper. "No person other than

the district attorney," is the emphatic language of the statute, "can be allowed to be present during the sittings of the grand jury." But *non constat* that the error is fatal. In State v. Whitney, 7 Or. 356, it was held, on a motion to set aside an indictment involving this identical question, that it was only the two cases enumerated in subdivisions 1 and 2 of section 115, of the criminal code, for which such a motion was available. "These," say the court, "are the only two cases for which an indictment can be set aside; and as the section prohibiting any other than the district attorney from appearing before the grand jury is not in chapter 7, there was no error in the ruling of the court." "But irregularities in the proceedings before the grand jury," says Mr. Bishop, "may, under some circumstances, be taken advantage of upon a motion to quash the indictment." But a motion to quash must be made at an early stage in the case, for it is inadmissible after verdict, as then the motion should be in arrest of judgment: 1 Bishop Crim. Proc., secs. 747, 748, 762. In Duer v. State, 53 Miss. 425, where the court permitted an attorney, who had been employed to assist in a prosecution, to go before the grand jury with the witnesses, and there act for the district attorney in framing the indictment, it was considered doubtful whether the objection could be raised by motion to quash the indictment, the court saying: "We regard it as bad practice, and certainly as being much more appropriately done by plea in abatement." But a plea in abatement does not answer to the charge made by the indictment, but it declines to answer it on the ground that the charge is not legally made: Bac. Abr., tit. Juries, A. And if the objection is not made at an early stage of the proceedings, it will be considered as waived; for, as was said in State v. Carver, 49 Me. 593, by pleading generally to the indictment, the defendant admits its genuineness, and waives all matters that should have been pleaded in abatement: People v. Robinson, 2 Park. Cr. 235, 309. Now, here the objection comes for the first time after trial and verdict upon a motion for a new trial. At most, it is but an irregularity, but of that character which does not bring into question the qualifications of the grand jurors or their fairness toward the accused. Nor is it claimed that any injustice or wrong was done to the prisoner by reason of this alleged error at the trial. Upon authority, it is clear the objection cannot prevail.

The next assignment of error is the overruling the objection of the appellant to the admission of certain pasteboard targets as evidence. It appears by the bill of exceptions that one James Birdseye, by direction of the coroner, and in the presence of the coroner's jury, made several experiments with the gun, with which the defendant claimed he had accidentally killed his father, by discharging it at certain targets made out of pasteboard, at different distances, respectively marked upon them. The coroner, Mr. Huffer, being on the witness stand, the prosecuting attorney, in the presence of the jury, exhibited to him these targets, to the admission of which the objection was made, which he identified, and further testified as follows: That "he saw the defendant's gun tested at different distances, and that the distances were

marked respectively on the targets; that he saw the gun loaded when the experiments were made; that the loads of powder were a charger full, and that the charger was the one on the pouch used by the defendant." Birdseye, who had loaded and fired the gun, testified: "I loaded the gun, using the powder-flask which the defendant said he loaded from when he killed his father. I filled the charger level full each time I loaded the gun. The distances on the targets are all correct." At the coroner's jury, the defendant had testified among other things that he had taken the gun at the suggestion of his father, and had gone out and shot a squirrel the dogs had treed. He says: "I started from the front porch to put the gun away; I came in near the door or through it to put the gun away; we generally keep the gun sitting behind the partition door on a stand table. I was in here and had just started in, the gun being cocked. If I remember rightly, I had the gun lying across my left arm and I started across the floor to put it away, it being cocked. I went to let the hammer down. I don't know whether or not I had hold of the hammer. I went to let the hammer down and touched the trigger, I suppose, before I got hold of the hammer, and the gun went off. I was about six feet from the door when the gun went off, that is, I think that was the distance. I suppose it is about the same distance to where my father was sitting in the chair when the gun went off."

With this explanation we now come to the pasteboard targets which were admitted in evidence against the objection of the defendant. Their object was to rebut the defense of accidental killing by showing that the statements of the prisoner upon which this defense was based were inconsistent with what it was claimed the inferences from the target experiments would prove to be the circumstances of the case. As no one was present except the prisoner when the deceased was killed, and as his statements were inconsistent with the theory of a "near" gun-shot wound, which the prosecution claimed was the cause of the death, the object of the experiments, made on the pasteboard targets which were offered in evidence, was to prove by inference that the deceased came to his death by a near gun-shot wound in the hands of the defendant.

This was the vital question involved in the issue, and to which the evidence excepted to was directed. But here it must be noted that the witnesses who made these experiments were not experts, and were, therefore, unable to express an opinion whether the phenomena indicated by near gun-shot wounds upon the human body corresponded in appearance with the phenomena exhibited as the result of their experiments, thereby connecting the similarity of the fact offered to be proved with the fact in issue; but it was proposed to show only the phenomena produced by near gun-shots on the pasteboard targets, from which it was claimed the jury were qualified and authorized to infer similar phenomena would be produced by near gun-shot wounds on the human body, and which, as a result of such inferences, would serve to illustrate the gun-shot wound from which the deceased died, and thereby

establish the point in issue, that the deceased was killed by a near gun-shot wound. Is the evidence of such experiments admissible for the purposes claimed? Gun-shot wounds belong to a branch of medical science, and often give rise to many questions of a difficult nature, although generally a gun-shot wound is easily distinguished. And among the questions frequently arising is, Was the ball fired near the deceased, or from the distance? Observation and study, however, in this department of science have noted and described with much exactness the appearance and character of gun-shot wounds. In "near" wounds, as they are termed, when the muzzle is placed near the surface of the body of the deceased when fired, the characteristics of the wound are thus described: 1. A superficial bluish color of the skin, from the contusion caused by the explosion; 2. Particles of charcoal and ignited powder imbedded in the skin; 3. Slight burning; 4. Coagulation of blood, mixed with powder, on the lips of the wound. If the muzzle is placed in direct contact when exploded, the wound is large and circular, the skin denuded, blackened, and burned, and the point at which the ball entered is livid and depressed: Dean's Med. Jur. 241; Wharton & Stille's Med. Jur. 707; Taylor's Med. Jur. 329; Beck's Med. Jur.

Now it must be manifest that there are here noted so many marked characteristics of near gun-shot wounds which could by no possibility be reproduced, or represented by experiments upon pasteboard, yet upon which the fact of a near wound is made to depend, and often to be determined, that it would be utterly unsafe to apply the inferences sought to be deduced from such experiments to the fact in dispute, unless there can be found in such experiments, and the subject-matter which it is their object to explain or illustrate, some point of similitude or ground of common resemblance, always present, as a result induced by a similarity of conditions or circumstances. It may be suggested that some identity of resemblance may be traced in the powder burns exhibited by the experiments as the result of near shots, and in the wounds of the deceased which the medical authorities indicate, are usually, if not always, present in "near" wounds. But when, as here, the case is not susceptible of direct proof, and the fact in issue—whether the ball was fired near or from the distance—depends of necessity for a correct determination upon the appearance of the wound, the fact and its experienced consequences does not belong to the ordinary information of men, but lies within the limits of a particular branch of medical science, and requires to be proved by persons skilled in it, the better to enable the jury to reach a safe conclusion. In Rush v. State, 61 Ala. 89, it was held that one not a surgeon or expert, although he had been in war, and seen the range of balls in gun-shot wounds, was properly excluded from testifying on a trial for murder by shooting.

It would seem, then, hardly to be safe to permit non-professional witnesses to prove, through the instrumentality of experiments, matters not within the range of their observation and experience, and of which they are supposed to be incompetent to deal. But besides this,

when it is considered how much other marked characteristics in conjunction with powder-burns aid in determining the fact of near wounds—what seemingly immaterial circumstances—even the kind or compound of the wadding used may affect the appearance of gun-shot wounds, how fundamentally different is the human body in nature and texture from the substance upon which the experiments were made; and when it is considered how important it is that experiments should be based on conditions and circumstances as nearly as possible like the matter they are intended to illustrate, to avoid the liability to misconception, or error from some supposed agreement or resemblance—we should certainly hesitate to admit such experiments as evidence unless supported by reason or sanctioned by authority.

In Commonwealth v. Piper, 120 Mass. 188, it is held that unless the experiments are shown to have been made under conditions the same as those existing in the case on trial, the tendency is to confuse and mislead the jury: Edit v. Cutler, 127 Id. 523. And in all the cases which have come under our observation, where such evidence has been held as admissible, the experiments were made with like means on the same kind of stuff or substance, or were based on a similarity of conditions or circumstances, whereby the results produced betray, with some certainty and uniformity, a common similitude or agreement, and as a consequence thereof furnish a safe foundation for inference, or the truth of the matter sought to be established. In State v. Blair, found in the notes to Wharton's Criminal Evidence, sec. 312, the experiments admitted in evidence were made with the same kind of pistol on the same kind of stuff as that of which the outer garments of Armstrong, the person shot, were made. But in Commonwealth v. Twichell, 1 Brewst. 566, where the object of the experiments was to ascertain the facility of breaking a human skull with a poker, and the witness testified that he had made experiments upon another skull with a poker like the poker with which the skull of the deceased had been broken, the evidence was rejected. In Smith v. State, 2 Ohio St. 513, the evidence of the experiments, which was decided ought to have been admitted, showed the experiments to have been made under similar conditions and like circumstances to the act in issue. Again, in Sullivan v. Commonwealth, 93 Pa. St. 285, the deceased was shot through her gown in the abdomen, and the experiments were made by a physician upon similar stuff, with the same pistol loaded with cartridges out of the same box, who, at the trial, was called as an expert to show the effect of powder-marks where a pistol is fired at short range, and it was held that his testimony, and the muslin used in his experiments, were admissible. But even if it be considered a matter of doubt whether the evidence objected to was proper or otherwise, we should feel bound in *favorem vitæ* to hold that in this case it was inadmissible, as it was pressed by the state as of vital consequence.

The next assignment of error is the refusal of the court to give an instruction asked for by counsel for the defendant, to the effect that if there was a reasonable doubt in the mind of the jury as to whether

the killing was done purposely, and of deliberate and premeditated malice, or accidentally, they should give the benefit of that doubt to the prisoner, and find him not guilty.

The error alleged to be in such an instruction is that the jury might believe the killing to have been accidental, and still consistently find the defendant guilty of manslaughter. In State v. Hardie, 47 Iowa, 647, it was held: 1. That if one use a dangerous and deadly weapon in a careless and reckless manner, whereby another is killed, the party so using the dangerous weapon is guilty of manslaughter, even though no harm in fact is intended; 2. That the degree of care in one handling a dangerous weapon is not the highest degree of care and prudence, but only such care as a reasonably prudent man would exercise under like circumstances. To the same effect is Chrystal v. Commonwealth, 9 Bush, 671, in which the court say: "It is insisted for the appellant, with force and plausibility, that if when he discharged the pistol he did not intend, by having it in his hands, to discharge it, or to do any unlawful act with it, his accidental killing of Ott could not have amounted to a felony, however gross may have been his carelessness in the use of the weapon; and we are referred to the case of Golliher v. Commonwealth, 2 Duval, 163, as sustaining this argument. But after a careful consideration of the question, we are unable to find in the case cited, or any other decision of this court, any departure from the general rule when applied to a case like this, that "whatever may be the difference as to degrees of homicide, a party whose negligence causes the death of another is in like manner responsible, whether the business in which he is engaged was legal or illegal. If the business was of such a character as to be felonious, the offense, it is clear, is murder. But even where the business is perfectly legal, negligence in the discharge of it, when producing homicide, is manslaughter." To this general rule there may be exceptions, as where an act careless in itself is committed with fatal results, under circumstances or at a place from which it might be inferred that no injury could happen from the carelessness of the party acting. There was no error in this assignment. But from the views before expressed, the judgment must be reversed and a new trial ordered.

STATE *v.* SMITH.

October Term, 1883.

ASSAULTING OFFICER OF PENITENTIARY—INDICTMENT.—Under section 677 of the criminal code, an indictment against a convict for assaulting an officer of the penitentiary with a deadly weapon must allege that the defendant knew the person assaulted to be an officer.

PRISONER CANNOT BE KEPT IN IRONS DURING TRIAL.—A prisoner cannot be kept in irons during his trial for a criminal offense. The delay and difficulty of removing such irons will not justify the refusal to have them removed.

APPEAL from Marion county. The opinion states the facts.

Bonham & Ramsey, W. G. Piper, and *S. F. Chadwick,* for the appellant.

W. H. Holmes, district attorney, for the respondent.

WALDO, J. The appellant, William Smith, a prisoner in the state penitentiary, was indicted under section 677 of the criminal code, for assaulting with a deadly weapon and wounding George Collins, an officer of the penitentiary, having the charge and custody of the prisoner. The appellant was tried, found guilty, and sentenced to death. Several errors are relied on to reverse the sentence; two of which are that the indictment was insufficient, in that it did not allege that the prisoner knew Collins to be an officer, and that the prisoner was kept with irons on his feet during the trial—a motion of the prisoner's counsel to have the irons removed being overruled on the ground that the irons were "put on the defendant at the penitentiary, and could not be removed without much delay, and it would require the work of a blacksmith to remove them;" to which ruling the prisoner's counsel excepted.

The sentence must be reversed on both grounds. An indictment must be so drawn as to exclude any assumption that the indictment may be proved and the defendant still be innocent: State v. Melville, 11 R. I. 418. To constitute the precise offense charged, the court deem the rule to be deduced from the authority to be that the prisoner must have known Collins to be an officer of the penitentiary: 2 Bish. Crim. L., sec. 51; Bishop on Stat. Crimes, sec. 664; Commonwealth v. Kirby, 2 Cush. 581; Horan v. State, 6 Tex. App. 183; State v. Downer, 8 Vt. 424.

On the second point, that it was error to keep the prisoner in fetters during the trial, the opinion in the case of State v. Kning, 1 Mo. App. 438, leaves nothing further to be said. The case was affirmed on appeal: 64 Mo. 591. The point was ruled the same way in People v. Harrington, 42 Cal. 165, which seems to have been the first case in this country where this ancient rule of the common law was considered and enforced. It is unnecessary to notice other errors assigned.

Judgment reversed.

FOREDICE v. RINEHART.

October Term, 1883.

REPLEVIN—DESCRIPTION OF PROPERTY—CERTAINTY.—The complaint in an action of replevin must describe the property claimed with reasonable certainty. It need not describe it with so great minuteness that an officer with his writ alone would be able to distinguish it from other property of the same kind.

THE SAME—DEFENDANT AFTER JUDGMENT CANNOT OBJECT.—In such action, a defendant who retains the property during suit cannot, after judgment is rendered against him for its return, object to the uncertainty of description.

APPEAL from Union county. The opinion states the facts.

Bonham & Ramsey, for the appellant.

J. A. Stratton, for the respondent.

LORD, J. This was an action of replevin to recover a certain quantity of flour, which the plaintiff alleges the defendant wrongfully and unlawfully took from his possession, and still unlawfully withholds from him. The answer denies these facts, and upon issue being joined, the trial resulted in a verdict in favor of the plaintiff, upon which the court rendered judgment for the plaintiff "for the return of sixteen and two fifteenths barrels of flour in sacks, the property described in the complaint, and in the event that said sixteen and two fifteenths barrels of flour cannot be found, that the plaintiff have judgment for the value thereof, to wit, the sum of one hundred and twenty-one dollars," etc. The defendant moved for judgment *non obstante*, which being overruled, the cause comes to this court on appeal. It appears by the record in this case that no steps were taken to secure the immediate delivery of the property by making the affidavit and giving the undertaking required for that purpose: Or. Code, secs. 130–133. We must conclude, therefore, upon the finding of the jury and the judgment of the court upon the record certified to us, that the defendant retained the possession of the property found to have been wrongfully taken from the plaintiff.

The principal objection is as to the sufficiency of the description of the property. It will only be necessary to refer to this briefly, for reasons which hereafter will appear manifest. There can be no doubt but that an exceedingly strict rule of practice formerly prevailed in regard to the description of property in replevin, but of late years the stringency of this rule has been much relaxed: Root v. Woodruff, 6 Hill, 418; Farwell v. Fox, 18 Mich. 169. The description goes to the identification of the thing—the property claimed—and when that is done with reasonable certainty this object is accomplished, and the purpose of the law subserved. Whatever goes beyond this would seem to be needlessly stringent, and subserve no good purpose. Now, the flour in question is described as in sacks, a part of which was branded with Caveniss & Sterling's brand of Island City Mills, and the other marked with a brand of the mill at Weston; and considering the nature of the subject to be described, there would seem to be in the description as reasonable a degree of certainty as the nature of the subject will admit of. But it is said that there ought to be such a description of the property as would enable the officer with his writ alone to distinguish it from other property of the same kind; but in Warner v. Angenbaugh, 15 Serg. & R. 11, the court say: "That officer is not obliged to execute the writ unless somebody attend to point out the things he is to deliver:" 2 Saund. 74 a, note 1. Nor in practice is he usually expected to do this, but the plaintiff, or some one on his behalf, points out the goods or property which has been taken from him, and to which his affidavit or judgment relates: Farwell v. Fox, 18 Mich. 169; Warner v. Angenbaugh, 15 Serg. & R. 11; Ruch v. Morris, 28 Pa. St. 249. "Barrels of flour may be a proper description of flour in bags, because the common usage of trade in many parts of the country warrants it:" Wells on Replevin, sec. 180. In Farwell v. Fox, *supra*, the action was

in replevin for six oxen, and the writ and declaration described them as "six oxen," and the same objection was interposed as here, but the court held the declaration sufficient. So, too, in Onstatt v. Ream, 30 Ind. 260, where the description in the complaint was of "one white shoat," and a motion was made to set aside the cause of action because the description was not specific enough, and the court held the complaint good, and the description of the property sufficiently definite. But it is hardly necessary to go further into an examination of the authorities to show that there is no fault in the complant. The fact is, the defendant is in no position to interpose this objection when the record shows him to have retained the possession of the very property for which this action is brought. In Ruch v. Morris, *supra*, the court say: "A declaration in replevin must be certain to a general extent, and the reason of the rule is that the sheriff may know, with reasonable certainty, when a *retorna habendo* comes to be executed, what he is to deliver, though he is entitled upon such writ to have the assistance of the defendant to point out the goods. But where the defendant interposes a claim property bond, and keeps the goods, he has not only individuated them, but he has no reason for objecting to indefiniteness of description. Whatever may be the result of the suit, it can give him no writ to the due execution of which a more minute description would be necessary. He has got the specific property, and minuteness of description thenceforth is important only to the plaintiff, and not to him. If, therefore, the declaration was faulty in the particular alleged, the defendant is not in a position to take advantage of it." But we do not think the complaint is defective, and even if it was, after verdict and judgment when the defendant has retained the property, he is not in a position to urge the objection—he has got the property, and the plaintiff a judgment for it or its value.

Judgment must be affirmed.

DESCRIPTION OF PROPERTY IN REPLEVIN.—Instances of sufficiency: See Stevens v. Osman, 48 Am. Dec. 696, and note; a defective description must be taken advantage of by special demurrer, as after verdict it will be held sufficient: Id.

DUNIWAY PUBLISHING CO. *v.* NORTH-WESTERN PRINTING AND PUBLISHING CO.

October Term, 1884.

INFRINGEMENT OF NEWSPAPER TITLE—INTENTIONAL FRAUD.—In the absence of a showing of intentional fraud, the use of the name "The Northwest News," as applied to a newspaper, will not be restrained at the instance of a newspaper having a prior right to use the name of "The New Northwest."

APPEAL from Multnomah county. The opinion states the facts.

Rufus Mallory, for the appellant.

Joseph Simon, for the respondent.

WALDO, J. This cause turns on the question whether the name "The New Northwest," as the title of a weekly newspaper published in the city of Portland, is pirated by the employment of the name "The Northwest News" for the title of a weekly newspaper published by defendant in said city. "The New Northwest" is the title of a weekly newspaper which has been published in Portland since the year 1871. "The Northwest News" is the title of a daily and weekly newspaper first published in the same place in January, 1883. The publishers of the New Northwest, believing the name chosen for the new paper an infringement of their exclusive right to the name by which their periodical was known to the public, made an application to the circuit court for an injunction to restrain the use of the title "The Northwest News" as the title of defendant's periodical. The complaint was accompanied by affidavits and sundry exhibits setting forth the facts relied on to sustain the application.

The allegations of the answer, so far as we deem it necessary to consider them, denied that the resemblance of the name of the defendant's publication to that of the plaintiff's was such as to constitute the infringement alleged. The answer was treated substantially as a demurrer to the complaint, and was sustained by the circuit court and the complaint dismissed. The question before us, therefore, is whether the complaint, with the affidavits and exhibits attached to it, stated facts sufficient to constitute a cause of suit.

The right of the publishers of the New Northwest to the title of their periodical as a trade-mark we deem to have been established. However, a brief statement of the law applicable to the case will show that there are no grounds for an injunction.

"Chancery protects trade-marks upon the ground that a party shall not be permitted to sell his own goods as the goods of another; and therefore he will not be allowed to use the names, marks, titles, or other *indicia* of another, by which he may pass off his own goods to purchasers as the goods of another:" McLean v. Fleming, 96 U. S. 255.

"In all cases where rights to the exclusive use of a trade-mark are invaded, the essence of the wrong consists in the sale of the goods of one manufacturer or owner as those of another:" Osgood v. Allen, Holmes, 194.

In Levy v. Walker, 10 Ch. Div. 436, it is said: "The sole right to restrain anybody from using any name that he likes in the course of any business he chooses to carry on is a right in the nature of a trade-mark. That is to say, somebody has a right to say, You must not use a name, whether fictitious or real, or a description, whether true or not, which is intended to represent, or is calculated to represent to the world, that your business is my business, and therefore deprive me, by a fraudulent misstatement of yours, of the profits of the business which would otherwise come to me. That is the sole principle on which the court interferes. The court interferes solely for the purpose of protecting the owner of a trade or business from a fraudulent invasion of that business by somebody else. It does not interfere to prevent the world

outside from being misled into anything:" Cited in the note to Robertson v. Berry, 33 Am. Rep. 337; S. C., 50 Me. 591.

No fraudulent purpose on the part of the defendant to pirate the plaintiff's trade-mark is alleged in the complaint, and at the argument plaintiff's counsel disclaimed that any such purpose existed in fact. But in Coffeen v. Brown, 4 McLean, 519, it was declared that intentional fraud is not necessary to entitle the plaintiff to protection. The point had been previously ruled the same way in Millington v. Fox, 3 Myl. & Cr., cited in Taylor v. Carpenter, 11 Paige, 292. But in such case the title of the defendant's paper must so closely simulate that of the plaintiff's that an infringement may be declared by the court as matter of law, or else the simulation must be proved as a fact. It is clear that the titles are sufficiently distinct to prevent the court declaring an infringement by mere inspection of the titles. It must be established, if at all, by extrinsic evidence.

But the facts set out in the complaint and affidavits and exhibit do not show any loss of trade. Inconveniences and annoyances from mistakes in the names of the two papers constitute no ground for an injunction. There must be actual injury to the sale of the plaintiff's paper. It does not appear that subscribers to the Northwest News, in eastern Oregon, and in Walla Walla, referred to in one of the affidavits, subscribed to the defendant's paper believing they were subscribing to the plaintiff's. Had such been the fact, it could have been easily shown by an affidavit of a party so misled.

In Snowden v. Noah, Hopk. 347, S. C., 14 Am. Dec. 547, there was a closer resemblance between the titles of the two papers than there is in this case. The title of the first was "The National Advocate," and of the second "The New York National Advocate." Yet an injunction was refused because the New York National Advocate did not claim to be the same paper as the National Advocate, and no intention to defraud existed.

In Osgood v. Allen, Holmes, 185, the title of complainant's paper was "Our Young Folks," an illustrated magazine for boys and girls, and of the defendant's, "Our Young Folks' Illustrated Paper." Both were illustrated periodicals for the young—the one a monthly, the other a fortnightly. Intentional deception was charged, but the court refused to order an injunction unless deception in fact was established.

It is unnecessary to consider additional grounds of defense urged by defendant's counsel, since, conceding these points to the plaintiff, the authorities cited are decisive in favor of the defendant as the case has been presented, and the decree pronounced must accordingly be affirmed.

Decree affirmed.

INFRINGEMENT OF TRADE-MARK—WHAT CONSTITUTES, AND WHEN ENJOINED: See Partridge v. Menck, 47 Am. Dec. 281, and note, in which this subject is discussed at length.

STATE *v.* JACOBS.

October Term, 1884.

CONTEMPT—VIOLATION OF INJUNCTION—OFFICER EXECUTING PROCESS OF SUPREME COURT.—An officer cannot be punished for contempt in violating an injunction of the lower court if he acts under the mandate of the supreme court.

APPEAL from Jackson county. The opinion states the facts.

George H. Williams and *John Kelsay*, for the appellant.

P. P. Prim and *B. F. Bonham*, for the respondent.

WALDO, J. It appears in this case that the contempt for which the appellant was adjudged guilty was for an act done in pursuance of a peremptory *mandamus* from this court. When the writ of *mandamus* was shown to the court below, the appellant should have been discharged. The writ was a complete defense, unless void as beyond the power of this court to issue it. But the counsel for the respondent was too learned to claim that this court was without power to enforce its judgments and decrees by *mandamus:* See Attorney-General v. Cushing, 2 Wis. 507; Riggs v. Johnson County, 6 Wall. 166; Douglas v. Loomis, 5 W. Va. 542; Jared v. Hill, 1 Blackf. 155; Ex parte Morris, 9 Wall. 606; State v. Elmore, 6 Coldw. 531; Henderson v. Winchester, 31 Miss. 294; People v. Bacon, 18 Mich. 25 3; State v. Judge of Second Judicial District, 20 La. 521; Sanders v. State, 16 Cent. Law J. 476.

Counsel urged, merely, that in the absence from the record of the grounds on which the court below issued the injunction, its action must be presumed to have been lawful, if, under any circumstances whatever, an injunction could have been rightfully issued. In this, counsel overlooks the fact that the officer was acting in obedience to process from this court. The question before us is as to the legality of the judgment and sentence of the court below in this case. It is shown that the appellant acted in obedience to a higher and controlling authority, which absolved him from obedience to the alleged injunction, and exacted obedience to its own commands. The illegality of the injunction was conclusively determined when the *mandamus* was ordered to go. This court was the sole judge whether occasion existed for issuing the writ. When its discretion was exercised and the writ issued, the sole duty of the court below was to yield obedience to it.

The facts are, that the decree of this court in the case of Harrison Kelly v. William Ruble and others, reversing the decree of the court below, was regularly pronounced, was entered on its journal, and a certified copy, with mandate accompanying it, was regularly remitted to the court below to be entered on its records and carried into execution. When the *mandamus* was issued it was determined that the alleged injunction, by which the execution of the decree of this court was sought to be stayed, was wholly illegal. That it was correctly so determined counsel hardly deny. The fact was too clear to the contrary. The sheriff of Jackson county but discharged his duty as a faithful officer in yielding obedience to rightful authority, and in refus-

ing to obey the illegal order of the circuit court to restore Kelly to the possession of property of which he had been lawfully dispossessed, in pursuance of a decree of this court. The judgment against him must be reversed.

Judgment reversed.

WATSON, C. J., dissenting. The writ of *mandamus* was directed to the circuit judge, clerk, and sheriff of Jackson county. The sheriff, appellant here, and a defendant in the injunction suit instituted by Kelly against him and the Rubles in the lower court, as well as William Ruble, had been served with the restraining order before the latter made his application for the writ. The writ was served on the clerk and sheriff during the judge's absence, and in obedience thereto an execution was issued by the clerk, who was not included in the restraining order, and placed in the sheriff's hands. The latter served it under William Ruble's direction and with his assistance, by taking the property in controversy out of Kelly's possession and delivering it to Ruble, in direct contravention of the restraining order. The judge had not yet returned, and no step had been taken in the circuit court to dissolve such order or obtain any new direction to the sheriff. For every legal purpose the writ would have had the same effect if it had been addressed to the clerk and sheriff alone.

Assuming, for the sake of argument, that the supreme court possesses the power to coerce the execution of judgments and decrees entered in the circuit court, in pursuance of its decisions, the question arises upon this state of facts, whether it can exert its authority directly upon the ministerial officers charged by the general law with the duty of issuing and executing final process on such judgments and decrees, or whether it can only reach them through the instrumentality of the circuit courts themselves.

If the latter theory is the correct one, then the writ should not have been directed to the clerk and sheriff at all, and the latter is not protected by it in this proceeding. The supreme court possesses appellate jurisdiction solely, and that extends only to the revision of "final decisions of the circuit courts:" Constitution, sec. 6, art. 7. Section 536 of the civil code is as follows: "The decision of the appellate court shall be given and enforced as provided in this section: Upon an appeal to the supreme court its decision shall be entered in the journal, and the cause remitted by mandate to the court below for further proceedings as therein directed; . . . . 2. If a new trial is not ordered, upon the receipt of the mandate by such clerk, a judgment or decree shall be entered in the journal and docketed in pursuance of the direction of the appellate court, in like manner and with like effect as if the same was given in the court below."

There is no provision for issuing or executing final process on such judgments and decrees, except such as are to be found in chapter 3 of the civil code. All returns upon such process must be made to the circuit court, and all proceedings thereon had before that court. Taking all the provisions on the subject together. no other deduction is possi-

ble. The statute gives the supreme court no final process, but requires judgments and decrees embodying the principles of its decisions to be entered and docketed in the court below, which are to have the same effect as if "given in the court below." It thus appears that while no final process is given to the supreme court, it is relieved of every duty requiring the employment of such process. It cannot be reasonably contended, in the face of such legislation, that any authority to use such process results by implication. It has no function to perform requiring the use of any such means. But the plain meaning of the statute is that such judgments and decrees, although entered and docketed under the authority of the supreme court, are to be executed by the circuit court as its own. Being invested by law "with like effect" as if "given in the court below," they virtually become the judgments and decrees of the circuit court. This, of course, gives the same remedies for their enforcement, and none other. The evident object of the statute was to put them on the same footing, in all respects, with final judgments and decrees rendered by the circuit court, and subject to its supervision and control to the same extent in every particular. Then the circuit court is charged with the duty of enforcing such judgments and decrees as its own, and of using its process for that purpose. Does the circuit court stand in any different relation to the supreme court, with reference to the execution of such judgments and decrees, than with reference to judgments and decrees rendered by itself, from which no appeal has been taken? Certainly not. Its duties are the same, and it possesses the same powers in each instance. The statute puts them in precisely the same position in the circuit court, and establishes perfect equality between them. If it is the duty of the circuit court, then, to execute such judgments and decrees the same in all respects as its own, upon what principle can any interference of the supreme court be justified that would not equally justify the same interference in respect to judgments and decrees finally rendered by the circuit court itself? Can it directly order and supervise the enforcement in the one case and not in the other? This would be in direct conflict with the positive provision as well as the plain intention of the law.

I conclude, therefore, that it is beyond the power of this court, in any case, to direct or control the execution of a judgment or decree, except through the operation of its appellate powers upon the court charged with that duty, and consequently that the appellant's defense under the writ cannot be maintained.

The constitutional and statutory provisions cited in the discussion of this question suggest another view, which is followed by the same consequences. Does the appellate jurisdiction of the supreme court, attaching upon the original appeal, extend to the execution of a judgment or decree in any case?

The statute providing for appeals invariably denominates the determinations of this court "decisions," not judgments, or decrees: Civ. Code, tit. 4, c. 6. And these "decisions" are "given and enforced" by

entering them in the journal of the supreme court, and remitting the "cause" to the court below for further proceedings as directed in the mandate: Sec. 536, *supra*. The mandate is founded on the "decision," and cannot go beyond it, in directions to the lower court. In cases like the present the "decision" of the supreme court is fully and completely "enforced" within the meaning of this section, and its mandate executed—for it is only the means employed for enforcing the "decision"—when a judgment or decree, as the case may be, conforming to the principles announced in the decision, has been duly entered and docketed in the circuit court. The statute expressly declaring that such decisions shall be enforced in the manner indicated, and plainly committing all necessary subsequent proceedings to the jurisdiction of the circuit court to which the "cause" is remitted by the mandate, leads irresistibly to the conclusion that with the completion of these steps the appellate jurisdiction terminates: Yale v. Heard, 26 Tex. 639; Cunningham v. Ashley, 13 Ark. 653. And this construction is in entire accord with the authorities on similar statutes, which, without a single exception, to my knowledge, hold that when the mandate remitting the "cause" has been regularly issued and filed in the lower court, the appellate court loses all jurisdiction over the subsequent proceedings in such cause: Legg v. Overbaugh, 4 Wend. 188; Rowland v. Kreyenhagen, 24 Cal. 52.

But if the appellate jurisdiction of the supreme court over the execution of such judgments and decrees is conceded in ordinary cases to the fullest extent claimed, it cannot be shown, from either reason or authority, that it exists in a case like the present, where the party claiming the benefit of an enforcement of the judgment or decree has been enjoined, in a distinct original suit, from taking further steps towards its enforcement, by a court of competent original jurisdiction. There are several very respectable authorities holding that the enforcement of such judgments and decrees may be enjoined by distinct, original suits in equity, in courts of competent original jurisdiction, and not one can be produced to the contrary: 1 High on Injunctions, sec. 265; Bank of Kentucky v. Hancock's Adm'r, 6 Dana, 284; Morgan v. Hart, 9 B. Mon. 79; Watson v. Avery, 3 Bush, 635; Davis v. Bonar and Kearns, 15 Iowa, 171; Massie v. Mann, 17 Id. 131. But while it is conceded that the circuit court may entertain such a suit and render a valid decree in a proper case, it is claimed that the supreme court may examine into the facts alleged as the cause of suit, and either interrupt or refrain from interfering with the proceedings in the circuit court, according to its judgment upon the sufficiency of the cause alleged. And this was the course adopted in this instance. But it is impossible that this view can be correct. If the circuit court has jurisdiction in a case of this character, where the facts alleged will justify it granting the relief sought, it must necessarily have it in every other case involving the same subject-matter. That would be the same whether the cause of suit alleged were good or bad. The jurisdiction of the circuit court to hear and determine whether the facts alleged in either case entitled the complainant to equitable relief would be just the same.

And the jurisdiction of the circuit court to restrain the execution of the judgment or decree in such new suit, is utterly repugnant to the existence of any jurisdiction in the supreme court, by virtue of the original appeal, to insist on their enforcement, and necessarily terminates it. Any supervision or control exercised by the supreme court over the circuit court with regard to the proceedings in the new suit involve the exertion of appellate power in that suit. But under our system the appellate jurisdiction of the supreme court is limited to the review of "final decisions" of the circuit court, and can be conferred even then only by appeal in the mode provided by the statute. Such is the effect of every former decision of this court on the subject. A cause cannot be brought to this court for review by the writ of *mandamus*. The supreme court is authorized to employ it only where it may be proper or necessary to maintain appellate jurisdiction already acquired over a cause by appeal: Civ. Code, sec. 594. And in no instance will it lie to control judicial discretion: Id., sec. 583. That the issuance of the restraining order was a judicial act is not open to question: Civ. Code, sec. 407; 1 High on Injunctions, sec. 15; Ex parte Hays, 26 Ark. 510; McMillan v. Smith, Id. 613; State v. Judge of Sixth District, 28 La. Ann. 905.

In my judgment, therefore, this court had no jurisdiction to employ the writ of *mandamus* as it did in this instance, no final decision having been reached in the lower court, and no appeal having been taken. None of the authorities cited in opposition to this view will be found, upon careful examination, to be applicable here. The powers of the various courts in which these decisions were announced, and the modes of procedure in acquiring and exercising jurisdiction, are widely dissimilar from the authority conferred and the procedure prescribed for this court by the constitution and laws of the state. My opinion therefore is that the judgment of the circuit court should be affirmed.

BAKER ET AL. *v.* EGLIN.

October Term, 1884.

GARNISHMENT—RIGHTS OF ATTACHING CREDITORS.—Attaching creditors, as against the garnishee, acquire the rights of the attachment debtor, and no more.

THE SAME—AGREEMENT TO PAY DEBTS OF ANOTHER.—Where A, for a valuable consideration, agrees with B to pay his debt to C, the latter can enforce the contract against A. Under such circumstances, creditors of B cannot hold A liable by process of garnishment to the extent the contract between them remained unexecuted at the date of the garnishment.

APPEAL from Benton county. The opinion states the facts.

John Kelsay and *R. S. Straham*, for the appellants.

W. S. McFadden, for the respondent.

WALDO, J. The garnishee in this case was surety on several promissory notes made by his brother, James M. Eglin, as principal, and

remaining unpaid, when on the twenty-first day of June, 1880, Thomas purchased James's interest in the livery-stable which they were carrying on as partners, in Corvallis. The consideration for such purchase was the payment of said promissory notes and the partnership indebtedness. Three of said notes remained unpaid when, on the third day of July, 1880, Thomas was served with process of garnishment by creditors of James. The question is, whether Thomas is liable to James's creditors to the extent the contract between him and James for the payment of the said notes remained unexecuted at the date of the attachment.

Counsel for the attaching creditors argue substantially that Thomas appears on the face of the notes to be a principal; that he cannot show by parol that he was a surety merely, and consequently that the consideration for the contract fails. They also argue that the holders of the notes cannot sue Thomas on his contract with James; that Thomas's legal liability is to James and not to the holders of the notes, and therefore that he is liable here.

The rule is that the attaching creditors, as against the garnishee, acquire the rights of the attachment debtor, and no more: Curtis v. Alvord, 45 Conn. 571; Carpenter v. Gay, 12 R. I. 307; St. Louis v. Regenfuss, 28 Wis. 144; Drake on Attachment, sec. 672; Railway Co. v. Gates, 10 Or. 515.

Thomas, as between himself and his principal can show by parol that he was surety merely: Daniel on Neg. Inst., sec. 1336. Hence, he can show it as against the attaching creditors.

On the second point, the authorities with us are quite decisive that when A, for a valuable consideration, agrees with B to pay his debt to C, the latter can enforce the contract against A: Campbell v. Smith, 71 N. Y. 26; Elwood v. Moak, 5 Wend. 235; Putney v. Farnham, 27 Wis. 187; Bassett v. Hughes, 43 Id. 319; Joslin v. N. J. Car Spring Co., 36 N. J. L. 141; 28 Minn. 521; 23 Am. Law Reg. 1.

The assent of the third person, for whose benefit the contract is made, will be presumed: Rogers v. Gosnell, 58 Mo. 589. It follows that a legal liability on the part of Thomas in favor of the holders of the notes existed at the date of the attachment, and therefore Thomas was not liable to garnishment. The judgment must be affirmed.

Judgment affirmed.

HOLMES, EXECUTOR, v. SCHOOL DISTRICT NO. 15.

October Term, 1885.

ASSESSMENT OF REALTY—VOID IF PROPERTY IS NOT DESCRIBED.—An assessment of real estate which does not describe the property, but consists simply of the entry, "acres of land, 1,580; value of land, $1,680," is void. And money paid under protest, for a tax founded on such assessment, may be recovered back.

APPEAL from Union county. The opinion states the facts.

J. A. Stratton, for the appellant.

Bonham & Ramsey, for the respondent.

WALDO, J. The question on this case arises on the validity of the assessment and collection of the tax extended thereon of real estate assessed to the respondent's testator in Union county. There is no description of the land in the assessment roll whatever. There appears therein simply this entry: "Acres of land, 1,580; value of land, $1,680."

In Tilton v. Oregon Central Military Road Company, 3 Saw. 22, Mr. Justice Deady said of a similar assessment: "That this assessment is illegal and void there is no room for doubt," and many authorities are cited. In addition to authorities there cited, counsel for respondent cite People v. Cone, 48 Cal. 43.

The school district, therefore, had no authority to collect the tax extended against the land, and this amount having been paid under duress may be recovered back.

There is no difficulty in separating the tax on the real property from that on personal. Because the assessment is legal as to some property assessed it does not follow that the party assessed must also pay on other property illegally assessed to him. All the authorities go to sustain the judgment of the court below, which must accordingly be affirmed.

Judgment affirmed.

DESCRIPTION OF LAND IN TAX ASSESSMENT.—An assessment of "part of a lot" or of "one acre of a lot," without location, is too vague: Massie's Heirs v. Long, 15 Am. Dec. 547; so, in California, as to a description "a tract of land entered by Frazier in section 13, township 13, range 7." In Oregon, a description which states the county, and designates the land as "thirty-seven and one half acres of land in section 11, township 1 south, range 1 east, known as 'Smith's farm,'" is sufficient: Brown v. School District, 7 West Coast Rep. 60. In California, a mistake in the name of the owner does not vitiate the assessment: Lake County v. Sulphur Bank etc. Co., 4 Id. 186; 8 Id. 151.

SUPREME COURT OF COLORADO.

SNYDER *v.* BOARD OF COUNTY COMMISSIONERS OF BOULDER COUNTY ET AL.

Filed November 13, 1885.

DEED—PAROL RESERVATION NOT BINDING—SUBSEQUENT GRANTEE WITHOUT NOTICE.—A deed of real estate, "with all the improvements thereon," cannot be varied by parol evidence that at the time of the conveyance it was understood and agreed between the parties that certain fixtures should be reserved to the grantor. Whatever liability is incurred by the grantee, by reason of such verbal agreement, none is incurred by a subsequent purchaser from him, without notice.

ERROR to the district court of Boulder county. The opinion states the facts.

Wright & Giffin, and *Owen & Stidger*, for the plaintiff in error.

Richard H. Whiteley, for the defendant in error.

STONE, J. The board of county commissioners of Boulder county, one of defendants, sold to one L. P. Snyder certain lots in the town of Boulder, and conveyed the same by warranty deeds. Situate upon the lots was a building previously used for a jail, and containing certain iron cells or cages for the keeping of prisoners, and had been in use several years for such purpose.

At the time of the sale by the county to Snyder there was an agreement between them for the renting of said building to the county for the sum of thirty dollars per month. Two days after this conveyance the purchaser, L. P. Snyder, sold and conveyed the same premises to L. C. Snyder, the plaintiff, by like warranty deed as that executed by the county. The county paid the rent aforesaid, monthly, to the agent of the plaintiff for nine or ten months, when the said cells were removed from the building by one Pauley, the codefendant, by order of the board of county commissioners, who converted them to their own use.

These cells were put up in sections riveted together, and in removing them they were taken apart by cutting the rivets; the water-pipes connecting with the wash-stands and water-closets in the cells were disconnected by cutting, as were also several rafters and ventilating pipes overhead, and the roof raised to effect the removal of the cells. It was testified by one of the county commissioners that at the same time the sale and conveyance was made by the county there was a verbal agreement that the county should have the privilege thereafter of removing the cells, and that the purchaser, L. P. Snyder, agreed thereto, but no written memorandum or record was made of such agreement.

The deed from the county, in addition to the usual warranty form, contained the following clause, after the description of the premises, to wit, "including all improvements thereon." And a like clause was contained in the deed to plaintiff.

The plaintiff testified that he had no notice at any time previous to the removal that there was any agreement for such removal or reservation of the cells in question, nor ever heard of any such claim on

the part of the county; that when he heard of the intended removal, he instructed his agent to serve notice of protest on the county commissioners against such removal, and it is admitted that the commissioners' journal shows that such written protest was served upon the board.

The suit was for value of the cells or return of the property.

The defendants had judgment below.

Upon this state of facts, we have no hesitation in saying that the deed of the county conveyed to plaintiff's grantor the cells in question. That the cells were fixtures upon the property conveyed, there can be no question. The jury were properly instructed upon this point. The law is too well settled to require argument or citation of authorities that verbal agreements, understandings, and conditions made contemporaneously with the execution of the written instrument cannot be shown to vary the terms of the deed or written agreement.

The testimony that it was agreed between the county commissioners and plaintiff's grantor that the cells were reserved from the sale and might be removed by the former, at their convenience, thereafter, is not contradicted, and must be assumed as a fact, but this will not avail them as a defense, since they neglected to incorporate such reservation in the deed, or in a contract of like binding effect.

Whatever liability might have been incurred by plaintiff's grantor arising out of his verbal agreement to a reservation of the cells and his consent to their removal, such agreement and consent could not effect the plaintiff without notice, such as to create thereby a privity of contract. His recognition of the lease, and the collection of rent carry a presumption of his knowledge of the proper terms of such lease, but such presumption cannot be extended to embrace a knowledge of a reservation of the cells and consent to their removal.

And counsel for defendants even admits that the presumption which the court instructed the jury to consider did not conclude the plaintiff, since it was rebutted by the positive denial by plaintiff of any knowledge or notice of such agreement.

The court erred in admitting testimony to contradict the terms of the deed, and in giving the instruction on behalf of defendants, touching the presumption above referred to, and for either of these errors the judgment should be reversed.

The motion for new trial should have been allowed.

The judgment is reversed and the cause remanded.

PAROL EVIDENCE IS INADMISSIBLE TO VARY DEED OR OTHER WRITTEN INSTRUMENT.—For illustrations of this rule, see Wells, Fargo, & Co. v. Carr, 8 West Coast Rep. 127; Dent v. Bird, Id. 142; Kimball v. McIntyre, 1 Id. 316; such evidence is admissible to identify the subject-matter of the contract: Richards v. Snider, 2 Id. 282; Armijo v. New Mexico Town Co., 5 Id. 482; Blair v. Bruns, 8 Id. 285; Morton v. Jackson, 40 Am. Dec. 107, and note; Bates v. Bank of Mo., 55 Id. 145, and note; and to show the circumstances surrounding the execution: Brewster v. Baxter, 2 West Coast Rep. 791. See, as to the admissibility of such evidence to contradict or vary a bill of lading, Chandler v. Sprague, 38 Am. Dec. 408, 416; Wayland's Adm'r v. Mosely, 39 Id. 335, and note; Bank of Rochester v. Jones, 55 Id. 300; of promissory note: Fitzpatrick v. School Commissioners, 46 Id. 76; Rose v. Laffan, 42 Id. 378; Adams v. Wilson, 45 Id. 242; of written contracts generally: Osborn v. Phelps, 48 Id. 145; Rearick v. Swinehart, 51 Id. 546.

SUPREME COURT OF CALIFORNIA.

No. 7,572.

CURNOW ET AL. *v.* HAPPY VALLEY BLUE GRAVEL ETC. MINING CO.

Department One. Filed December 23, 1885.

FORECLOSURE OF MECHANICS' LIENS—JOINDER OF ACTION—DENIAL OF SEPARATE TRIAL.—In an action, under section 1195 of the code of civil procedure, by two lienors, to foreclose their liens, the refusal of the court to allow the defendant separate trials of the respective claims of the plaintiffs, is not prejudicial error, if, after demanding such trials, the defendant withdrew his answer as to one of the plaintiffs.

THE SAME—PARTY NOT ENTITLED TO JURY TRIAL—EQUITABLE ACTION.—An action to foreclose a mechanic's lien is a proceeding in equity, in which a party is not entitled as of right to a jury trial. Consequently granting or refusing a demand for a jury trial in such case is entirely within the discretion of the court.

THE SAME—DENIAL OF WORK MUST BE POSITIVE.—In such action, where the answer admits ownership of the property, and the employment of the plaintiff to perform labor upon it, by the defendants' superintendent, a denial that plaintiff performed such labor, must be positive; a mere denial, upon information and belief, does not raise any issue.

THE SAME—DESCRIPTION OF PROPERTY IN LIEN.—A description of the property upon which liens were created, as "that certain mining property and real estate situated in Mokelumne Hill mining district, in said county, in sections 8, 18, and 17 of township 5 north, range 12 east, Mount Diablo base and meridian, and known as the Happy Valley Blue Gravel and Hydraulic mining claim, commencing in said section 7, in Happy Valley, at and including the placer mining claim formerly owned by Patrick Drumm, and running southerly down and along the gravel channel into said section 18, into the Sport Hill diggings, to and including the placer mining claim formerly owned by Harry Percival, together with a tunnel commenced in said section 17 by said defendant, on the Calaveras-river side of the ridge east of said mining ground, and running westerly and towards the southern end of said mining ground, for the purpose of tapping the same and working the same through said tunnel as a hydraulic mining claim; and that said tunnel is a part of said defendant's said mining claim." This description is sufficient for identification.

THE SAME—DENIAL OF LEGAL CONCLUSION.—In such action a denial that the plaintiff has "at all complied with the requirements of the provisions of chapter 2, title 4, part 3, of the code of civil procedure of the state of California, relating to mechanics' and laborers' liens, or that he is entitled to any lien on any property of defendant," is but a conclusion of law.

APPEAL from a judgment of the superior court of Calaveras county, entered in favor of the plaintiffs, and from an order denying the defendant a new trial. The opinion states the facts.

F. A. Berlin, for the appellant.

Wesley K. Boucher, and *Severance & Travers*, for the respondents.

MCKEE, J. This is an appeal from a judgment of the superior court of Calaveras county, rendered in an action for the foreclosure of laborers' liens upon certain mining property, and from an order refusing to grant a new trial.

The motion for a new trial was made upon a bill of exceptions, which contained specifications of errors of fact and of law, upon which the moving party relied.

The alleged errors of law are: 1. That the court refused to allow the defendant a separate trial of the respective claims of the plaintiffs; and 2. That it refused to order a trial by jury.

1. The action was brought under section 1195 of the code of civil procedure, which provides that any number of persons claiming liens

against the same property may join in the same action. On the calling of the case for trial upon the issues framed by the complaint and answers, defendant demanded a jury trial, and a separate trial of each cause of action. The court denied the demand for a separate trial, and there being no jury in attendance—the regular panel of jurors having been previously discharged—denied the demand for a jury trial, unless the defendant would make a deposit of money with the clerk sufficient to pay the clerk's and sheriff's fees for summoning a jury and the jury fees for twenty jurors, estimated to amount to sixty dollars in all. This the defendant would not do, and the court thereupon proceeded to try the case without a jury. But before the plaintiffs opened their case the defendant asked leave to withdraw its answer as to the plaintiff Sullivan, and that answer was, on defendant's motion, stricken out; and the case was tried on the issues joined by the plaintiff Curnow and defendant.

In the refusal to grant a separate trial there was no prejudicial error, even if it were conceded that the court had no power to consolidate the actions, because as the defendant, after its demand for a separate trial, withdrew its answer to Sullivan's cause of action, it waived the trial in that case, which was previously demanded and refused; and there only remained for trial the issues joined in Curnow's case.

Nor was there any prejudicial error in denying defendant's motion for a jury trial after its refusal to comply with the condition upon which the court was willing to order the issues in the case to be tried by a jury.

As the object of the action was foreclosure of laborers' liens upon real property as security for money due to persons performing manual labor on the same, the action was an equitable one. A mechanic's or laborer's lien is in the nature of a mortgage on the land: Ritter v. Stevenson, 7 Cal. 389; and an action for its foreclosure is a judicial proceeding in equity, in which a party to the proceeding is not entitled, as matter of right, to a jury trial. The code rule, in such cases, is that "issues of fact must be tried by the court, subject to its power to order any such issues to be tried by a jury," etc.: Code Civ. Proc., sec. 592. Granting or refusing a demand for a jury trial in an equity case is therefore extirely within the discretion of the court: Societé Française v. Selheimer, 57 Cal. 623.

2. The only specification of errors of facts is that the evidence was insufficient to justify the decision, and that the decision is against law in "that there was no evidence to identify the real estate set out in the complaint as property upon which the labor was performed."

But the defendant admitted its ownership of the property as described in the complaint; it also admitted employment of the plaintiffs by its superintendent, but denied that the superintendent continued in office all the time that the plaintiffs claimed to have performed manual labor on the property; and for answer to an allegation in the complaint, "that the plaintiff performed work and labor as a miner upon the (described) mining property of defendant," it averred as follows:

"Defendant is not sufficiently informed to admit that the plaintiff performed work and labor as a miner upon the property of defendant, and therefore defendant denies said allegation."

Admitting ownership of the property described in the complaint, and employment of the plaintiffs by its superintendent to perform manual labor upon it, it would be rash to presume that the defendant did not know that it was the property upon which the plaintiffs performed the work and labor for which they sued. Possessing such knowledge, the defendant was bound to state it in positive terms if it said anything about it at all: San Francisco Gas Company v. San Francisco, 9 Cal. 466; Vassault v. Austin, 32 Id. 607; and its answer that the plaintiff did not perform the work upon the property "as a miner," is merely equivocal and evasive, and raised no issue as to the identity of the property upon which the work was done.

The evidence was sufficient to justify the decision.

The motion for a new trial was properly denied.

Notwithstanding its withdrawal of the answer in the case of Sullivan, the defendant insists that the judgment entered in that case and the judgment and decision in the case of Curnow should be reversed, because the complaint in the action contains two separate causes of action which are not separately stated; because the complaint does not state facts sufficient to constitute a cause of action in favor of either of the plaintiffs; because the real estate upon which the liens are alleged to have been filed is not sufficiently described, and because the decision and judgment do not correspond with the pleadings.

The court found the ultimate facts of the plaintiffs' cause of action. That was sufficient; and on these facts the legal conclusion drawn by the court was correct.

The description of the mining property upon which the liens were created is as follows:

"That certain mining property and real estate situated in Mokelumne Hill mining district, in said county, in sections 8, 18, and 17 of township 5 north, range 12 east, Mount Diablo base and meridian, and known as the Happy Valley Blue Gravel and Hydraulic mining claim, commencing in said section 7 in Happy Valley, at and including the placer mining claim formerly owned by Patrick Drumm, and running southerly down and along the gravel channel into said section 18 into the Sport Hill Diggings, to and including the placer mining claim formerly owned by Harry Percival, together with a tunnel commenced in said section 17 by said defendant, on the Calaveras-river side of the ridge east of said mining ground, and running westerly and towards the southern end of said mining ground, for the purpose of tapping the same and working the same through said tunnel as a hydraulic mining claim; and that said tunnel is a part of said defendant's said mining claim."

This description is sufficient for identification.

The two causes of action stated in the complaint are separately stated, and the statement of each is sufficient to constitute a cause

of action. The allegations in such statement as to the making and filings of the liens sought to be foreclosed, show that the liens attached to the property; and the only denial by the defendant related to the filing of the liens, in connection with a denial "that the said Curnow has otherwise or at all complied with the requirements of the provisions of chapter 2, title 4, part 3, of the code of civil procedure of the state of California, relating to mechanics' and laborers' liens, or that said plaintiff Curnow is entitled to any lien on any property of defendant." This denial is but a conclusion of law.

The complaint was sufficient: Barber v. Reynolds, 44 Cal. 519.

There is no prejudicial error in the judgment roll.

Judgment and order affirmed.

ROSS and MCKINSTRY, JJ., concurred.

No. 11,188.

ACKER v. SUPERIOR COURT.

Department One. Filed December 23, 1885.

JUSTICE'S COURT—APPEAL ON QUESTIONS OF LAW AND FACT—TRIAL IN SUPERIOR COURT.—Where an appeal from the justice's court has been taken on questions of law and fact, the superior court must itself proceed with the trial, under section 976 of the code of civil procedure. It cannot reverse the judgment and remand the cause to the justice's court for further proceedings.

APPLICATION for a writ of review. The opinion states the facts.

Royce & Cummins, for the petitioner.

Carl F. Graef, for the respondent.

MCKEE, J. Application for writ of review. From the averments of the petition it appears that on an appeal to the superior court of the city and county of San Francisco, taken on questions of both law and fact, from a judgment given in an action tried by a justice's court, the superior court ordered the judgment reversed and the cause remanded for further proceedings.

The order remanding the cause to the justice's court for further proceedings is in excess of the jurisdiction of the court, and void.

For, as the case was originally tried in the justice's court, and the appeal was taken "on questions of both law and fact," appellate jurisdiction over the action attached to the superior court, to try and determine the case anew: Code Civ. Proc., sec. 976.

In the exercise of this jurisdiction the superior court cannot delegate its power over the action to any other tribunal. It has no authority to remand the cause to the justice's court, whence it came, for trial *de novo*. It must itself proceed with the trial: Code Civ. Proc., sec. 976; Coyle v. Baldwin, 5 Cal. 75; Hitchcock v. Freelon, 8 Id. 517; and if it refuses it may be compelled to proceed by *mandamus:* Beaty v. Superior Court, 11 Pac. C. L. J. 70.

Let a writ of review issue as prayed for.

ROSS and MCKINSTRY, JJ., concurred.

No. 9,120.

MAY ET AL. v. STEELE.

Department One. Filed December 28, 1885.

VERDICT—EXCESSIVE DAMAGES.—A verdict of one thousand three hundred dollars, recovered in an action for damages caused by a beating, will not be set aside as excessive.

APPEAL from a judgment of the superior court of Alameda county, entered in favor of the plaintiffs, and from an order denying the defendants a new trial. This was an action to recover for injuries sustained by a beating inflicted on the plaintiff by the defendant. Plaintiff recovered a verdict for one thousand three hundred dollar

J. B. Lamar, for the appellant.

J. B. Ogden, for the respondents.

The COURT. Appeal from a judgment and order denying a new trial in an action to recover damages for personal injuries.

Two assignments of error are made in the case: 1. That the verdict is not justified by the evidence; 2. That the damages awarded are excessive.

As to the first, there was a substantial conflict in the evidence; the verdict must therefore be taken as conclusive of the facts.

As to the second, we cannot say, as matter of law, that the verdict was given under the influences of passion, prejudice, or bias of any kind.

Judgment and order affirmed.

No. 9,034

NATHAN v. SUTPHEN.

Department One. Filed December 28, 1885.

SERVICE OF NOTICE OF APPEAL—WHAT SUFFICIENT.—Where the attorney of the respondent refuses to receive a copy of a notice of appeal, it is a sufficient service if the person making the same, in the presence of such attorney, and in his office, places the copy on a table in front of the attorney and leaves it there.

APPEAL from a judgment of the superior court of Santa Cruz county. The opinion states the facts.

J. H. Skirm, for the appellant.

C. B. Younger, for the repondent.

The COURT. A motion is made to dismiss the appeal in this case upon the ground that a copy of the notice of appeal was not served. It appears that after filing the notice of appeal, and on the same day, a copy of the notice was taken by a competent person to the office of the attorney for respondent, and there handed him in person. Respondent's attorney refused to take the notice, whereupon the person making the service, in the presence of the attorney, and in his office, laid the copy on the table in front of which the attorney was standing, and there left it. The service was sufficient. Motion denied,

No. 8,629.

WILLIAMS *v.* MILLER ET AL.

In Bank. Filed December 28, 1885.

CONTRACT OF AGISTMENT—CONDITION THAT LAND IS FIT FOR GRAZING.—The plaintiff and defendants entered into an agreement whereby the former undertook to agist and pasture the defendants' cattle; the defendant agreed to pasture on the land all the cattle it was capable of grazing, and in no case less than three thousand head, and to herd them at their own cost, and pay the plaintiff one dollar for each head of cattle so pastured. *Held*, that the condition of defendants' agreement was that the land should be "capable of grazing" the cattle; that if not capable of grazing three thousand head of cattle the defendant was not liable to pay the full price for pasturage.

APPEAL from a judgment of the superior court of the city and county of San Francisco, entered in favor of the defendants, and from an order denying the plaintiff a new trial. The opinion states the facts. The opinion in department is reported in 5 West Coast Rep. 526.

G. W. Gordon, for the appellant.

Robinson, Olney, and Byrne, for the respondents.

BELCHER, C. C. The plaintiff, being the owner of about twenty thousand acres of swamp and overflowed land near the mouth of the San Joaquin river, on the twenty-first day of March, 1877, entered into a written contract with the defendants "to agist and pasture" upon his land certain cattle belonging to defendants for the term of one year from the date of the contract. The defendants, on their part, agreed "to pasture on said land, at their own risk and cost for herding, etc., all the cattle it shall be capable of grazing, over and above the sheep hereinafter mentioned, and in no case less than three thousand head," and to pay therefor one dollar for each and every head so pastured; one half of the money to be paid when the cattle are driven to the land, and the other half in six months from that time.

The defendants did not see the land or know of its condition when the contract was made, but in 1864, and again in 1871, they had pastured a large number of cattle upon it, and the land then furnished very valuable summer pasture. At that time the surface of the ground was covered by a sod from one and a half to two and a half feet thick, made of vegetable matter, half dead and half alive, and which was sufficient to sustain cattle passing over it.

Between 1871 and 1877 efforts were made to reclaim the land by building levees around it, and the sod, with the exception of a few acres near Webb's Landing, and a few other scattered patches, was burned off.

When the contract was made the levees were broken, and the tide ebbed and flowed over the whole tract, with the exception of the few places where the sod had not been burned, and this condition continued during the whole year.

Grass grew on the unburned places, but, with the exception of that near Webb's Landing, the ground intervening was so miry that cattle could not be driven or taken to them.

In May the defendants sent to the tract near Webb's Landing by boat seven hundred and seventeen head of cattle, and on the seventh of June they paid the plaintiff for their pasturage seven hundred and seventeen dollars. The cattle remained there about three months, during which time the feed was consumed, and one hundred and thirty-four head were lost. The rest of them had to be taken away, or, as the herder testified, "we would have lost them all."

This action was commenced to recover from the defendants the sum of two thousand two hundred and eighty-three dollars, which, it is alleged, is still due for the cattle which the defendants obligated themselves by their contract to send to and pasture on the plaintiff's land. The case was tried by the court, and judgment entered in favor of the defendants. The appeal is from the judgment and an order denying a new trial.

The decision in the court below was made upon the theory that the contract was not a lease of the land, but an agreement on the part of the plaintiff to pasture the defendants' cattle at a certain stipulated price per head, and that, being unable to furnish the pasturage, he could not require the defendants to pay for what they did not and could not receive.

It is claimed for the appellant that this theory was wrong; that the contract was in effect a lease, and the money to be paid, rent, and that the respondents cannot relieve themselves from the payment of the stipulated rent, because they were unable to pasture upon the land as many cattle, or for so long a time, as they supposed they could when they took the lease.

We think the court was right in its construction of the contract. The plaintiff undertook to agist and pasture the defendants' cattle, and reserved the right to pasture on the land, after August 1st, ten thousand head of sheep belonging to himself, provided the sheep should not interfere with the cattle.

The defendants agreed to pasture on the land all the cattle it was capable of grazing, and in no case less than three thousand head, and to herd them at their own risk and cost.

Webster defines the word "agist" to mean "to take to graze or pasture at a certain sum," and "agistment" as "the taking and feeding other men's cattle in the king's forest, or on one's own land, at a certain rate."

No particular words are necessary to create a lease. "Whatever words are sufficient to explain the intent of the parties that one shall divest himself of the possession, and the other come into it for such a determinate time, such words, whether they run in the form of a license, covenant, or agreement, are of themselves sufficient, and will, in construction of law, amount to a lease:" Bac. Abr., tit. Leases; Bouv. Law Dict., tit. Lease.

Do the words used here show that it was the intention of the parties that the one should divest himself of the possession of the land and the other take possession? If so, why did the contract provide that

the defendants should bear the cost and risk of herding their own cattle? If they had a lease they were required to do that, and no such provision was necessary.

We think the contract was one for the agistment of cattle, and that the condition of the defendants' agreement was that the land should be "capable of grazing" them. Both parties evidently contemplated that it would be capable of grazing more than three thousand head, or no reservation would have been made of the right to pasture thereon ten thousand head of sheep. As they were mistaken in this, it cannot be supposed that it was intended that defendants should place their cattle there to be starved or drowned, and failing to do that, be requested to pay the full price for their pasturage.

The judgment and order should be affirmed.

SEARLS, C., and FOOTE, C., concurred.

By the COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

No. 9,272.

WILLIAMS *v.* SOUTHERN PACIFIC RAILROAD COMPANY.

Department One. Filed December 23, 1885.

NEW TRIAL—STATEMENT ON—CONSIDERATION OF, ON APPEAL.—When a statement on motion for a new trial is certified by the judge of the court in the manner provided by law, and filed with the clerk, it becomes part of the record. And where the notice of motion for a new trial specifies that the motion would be based on "a statement of the case," such statement, prepared, settled, and filed, will be presumed to have been used on the hearing of the motion; and coming to the supreme court as a part of the record on appeal, under section 661 of the code of civil procedure, duly certified by the clerk, will be considered without further identification or proof that it was used on the motion for new trial.

NEGLIGENCE—CONTRIBUTORY—PROXIMATE CAUSE.—One who is injured by the mere negligence of another cannot recover compensation therefor, if, by his own ordinary negligence or willful wrong, he proximately contributed to produce the injury of which he complains,; so that but for his concurring and co-operating fault the injury would not have happened to him, except where the more proximate cause of the injury is the omission of the other party, after becoming aware of the danger to which the former is exposed, to use a proper degree of care to avoid injury.

THE SAME—LYING DOWN ON RAILROAD TRACK.—One who, in a state of intoxication, lies down upon a railroad track, is guilty of gross negligence, and if he is injured by being run over by a passing train the company is not liable, unless, in the exercise of reasonable care after the person is discovered in his exposed position, it could not have avoided the injury.

THE SAME—DUTY OF RAILROAD AS TO TRESPASSER ASLEEP ON TRACK.—Where a railroad company discovers a person asleep or helpless upon its track, as the presumption is that he cannot help himself, it becomes the duty of the company and its employees to use all reasonable care, by stopping its train, so as to prevent injury to one helpless to save himself from impending danger. At other places upon its road where persons have a right to be, the company is not bound, except in behalf of its own passengers, to watch for trespassers upon its track, but if at any time and at any place it discovers persons upon its road, apparently unable to protect themselves from its passing trains, it becomes its bounden duty to use all reasonable care and diligence to prevent their being injured; and, failing in this duty, it will become liable for injury to such persons, although they may have been guilty of contributory negligence, the injury being in such cases attrib-

uted to the willful or wanton act of the company, as the proximate cause, and not to the negligence of the injured party. For trespassers a railroad company is not bound to be watchful; hence no presumption of negligence arises from the absence of such care, as to such persons. As to a trespasser upon the road who is injured, being himself negligent, the evidence should show, not merely that he might have been seen, but that he was in fact seen, in time and under circumstances rendering it the duty of the company to check the progress of its train, before it can be held for an injury to such wrong-doers.

THE SAME—CONTRIBUTORY NEGLIGENCE, WHEN QUESTION FOR COURT.—Where the question of contributory negligence is left in doubt by the evidence it should be submitted to the jury under proper instructions, but where the evidence is clear as to the facts, the question of contributory negligence is one of law for the court.

APPEAL from a judgment of the superior court of Monterey county, entered in favor of the plaintiff, and from an order denying the defendant a new trial. The opinion states the facts.

S. F. Geiland and *H. V. Morehouse*, for the appellant.

D. M. Delmas, for the respondent.

SEARLS, C. This is an action to recover damages for an injury received by the plaintiff from defendant's railroad cars. Plaintiff had judgment for fifteen thousand dollars, from which judgment, and from an order denying a motion for new trial, defendant appeals.

The material averments of the complaint are, that defendant is a corporation, the owner and manager of a certain railroad extending southerly from the town of Castroville, in the county of Monterey, to the city of Salinas in the same county, and of the rolling stock on such road. That on the twenty-third day of July, 1882, the defendant was running a train, composed of a locomotive-engine and cars, on said road, and that through the negligence, carelessness, and fault of the defendant in running and operating such train the same struck and run over the plaintiff, the wheels thereof passing over and crushing the right foot of plaintiff so that it had to be and was on the same day amputated above the ankle joint.

The answer denies all negligence, carelessness, or fault by or on the part of defendant, and avers that whatever injuries or damages were received, suffered, or sustained by said plaintiff, were in consequence solely of the negligence and culpable carelessness of the plaintiff, without any fault on the part of defendant.

It is urged by counsel for respondent that the statement on motion for new trial cannot be considered by this court, because, as is contended, there is nothing in the record showing that the statement was used on the motion. The statement was settled by the superior judge, and duly certified as true and correct, on the third day of September, 1883, and thereafter, on the seventeenth day of September, the motion for a new trial was by the court denied.

The record on appeal is properly certified by the clerk of the county of Monterey, and *ex officio* clerk of the superior court in and for said county.

We are referred to Nash v. Harris, 57 Cal. 242, and Simpson v. Ogg, 1 West Coast Rep. 303, in support of respondent's contention.

In Nash v. Harris, *supra*, which was a motion to set aside a judgment, certain affidavits and papers were on file, but which were not

embodied in any statement or bill of exceptions, or in any way authenticated, and the court, after holding that they were in no way identified as having been used on the motion, proceeds as follows: "We cannot indulge in presumptions of papers which were used in the court below on the hearing of a motion. To be considered, they must be made part of the record of the case by a bill of exceptions, or be authenticated by the judge who tried the case, in such a way as to leave no doubt, when found in the transcript, that they are the papers which were before him when he acted, and upon which he decided.

"Unauthenticated papers in a transcript in which there is no bill of exceptions constitute no part of a record which can be considered upon appeal."

In Simpson v. Ogg, the supreme court of Nevada held that a statement on motion for new trial, based upon a statement not agreed to by the parties or their attorneys, and not certified as correct by the judge, in accordance with the statute, could not be considered on appeal.

The object of a statement or bill of exceptions is to make that record which before was not record, but rested only in the recollection of the court or counsel, or the minutes of the clerk: De Johnson v. Sepulveda, 5 Cal. 149.

And when a statement on motion for new trial is certified by the judge of the court in the manner provided by law, and filed with the clerk, it becomes a part of the record.

It is not the filing of a document like that under consideration which gives to it its character as a record, but the certificate of the judge as provided by section 659 of the code of civil procedure, and the filing thereof, which impresses it with that character.

The notice of motion for new trial in this case specified, among other things, that the motion would be based on "a statement of the case." The statement was prepared, settled, and authenticated by the judge, and filed in due time. Thus prepared, settled, and filed it will be presumed it was used on the hearing of the motion for new trial, and coming here as a part of the record on appeal under section 661 of the code of civil procedure, duly certified by the clerk, it is entitled to consideration without further identification or proof that it was used on the motion for a new trial: Towdy v. Ellis, 22 Cal. 651. It occupies a different position from affidavits and papers having no official sanction, and which, although filed, require official designation to identify them as having been used.

Plaintiff, being intoxicated, laid down alongside defendant's railroad, and fell asleep, with his feet so near the rail that a passing passenger train struck and crushed his right foot, rendering amputation necessary.

The place of the accident was near a private crossing of the railroad, known as Kelleher's Crossing, between Castroville and Salinas, and from one mile to one and a half miles from the latter place. The injury was caused by the engine of defendant's regular passenger train,

bound south, and running from eighteen to twenty miles per hour, over a straight road and level track. Defendant's engineer, in charge of the train, saw plaintiff alongside the track and stopped his train, but not until the engine had struck him, and passed nearly or quite its length beyond the point where he lay. The case depends largely upon the question of contributory negligence by plaintiff.

He who is injured by the mere negligence of another cannot recover compensation therefor, if by his own ordinary negligence or willful wrong he proximately contributed to produce the injury of which he complains; so that but for his concurring and co-operating fault the injury would not have happened to him, except where the more proximate cause of the injury is the omission of the other party after becoming aware of the danger, to which the former is exposed, to use a proper degree of care to avoid injuring him.

The rule as thus stated is that laid down by Shearman and Redfield on Negligence, sec. 25, and is amply supported by authority.

When plaintiff laid down upon the line of defendant's railroad, over which, as he knew, trains were running, and in such proximity to its track that he was liable to injury from such passing trains, that he was guilty of negligence cannot be doubted. He was a trespasser upon the roadway; was at a point thereon where he had no right to be. It is true he had been expelled from defendant's cars for alleged non-payment of fare some three hours previously, at or near the point where he was injured, and for a reasonable time thereafter may be deemed to have had a license to be upon the line of the road; but the evidence tends to show that he visited a house near at hand, and returned to the place of his injury. Such expulsion from the cars could give him no permanent right to locate and remain upon the road.

A man may contribute to his injury without affecting his right to recover. In order to defeat his right to recover he must have not only contributed to the injury, but must have contributed to it under circumstances showing negligence on his part. He must have been in fault, must have failed to use ordinary care for his own protection, and the want of such care must not only have contributed, but have contributed proximately, to the injury.

"Walking along the track of a railroad, where it does not run upon a highway, is culpable negligence. . . . . Lying down upon a railroad is obviously the grossest negligence, which nothing can well excuse:" Shearman & Redfield on Negligence, sec. 487; Louisville R. R. Co. v. Burke, 6 Coldw. 45; O'Keefe v. Chicago R. R. Co., 32 Iowa, 467; Ill. Cent. R. R. Co. v. Hutchinson, 47 Id. 408; Herring v. Wilmington R. R. Co., 10 Ired. 402.

In Felder v. Louisville Railroad Company, 2 McMull. 403, and Richardson v. Wilmington Railroad Company, 8 Ired., L. 120, slaves were asleep upon the track, and were killed, without any effort to stop the train; but it did not appear that the engineer saw them. The companies were held not to be liable. The case of Herring v. Wilmington Railroad Company, 10 Id. 402, was in many respects parallel with this.

The plaintiff's slave lay down to sleep in the day-time, on a railroad track, where the train could have been seen for more than a mile. The cars approached at their usual speed, at the usual hour; and the engineer, when within a short distance of the slave, attempted to stop the engine by letting off the steam and reversing the wheels. And it was held the company was not liable.

We think it follows that in the case at bar the negligence of plaintiff was not only the cause of his injury, but the proximate cause of such injury. By proximate cause we must be understood as meaning "that cause from which a man of ordinary experience and sagacity could foresee that the result might probably ensue:" Shearman & Redfield on Negligence, sec. 10.

He was not, therefore, entitled to recover, unless, notwithstanding such negligence, defendant was guilty of some wanton or willful act, whereby the injury was caused to plaintiff: Manumus v. Champion, 40 Cal. 121.

In Weymire v. Wolf, 52 Iowa, 533, the court said: "If a person lies down upon a railroad track in a state of helpless intoxication, the company will not be justified in running a train over him, if it can be avoided in the exercise of reasonable care after the person is discovered in his exposed position."

One wrong or injury cannot justify or excuse another. A railroad company engaged in the carrying of passengers owes important duties to the public. It must use great care in furnishing all proper appliances for the safe conduct of persons confided to its care. It must transport its living freight with all reasonable speed, and its paramount duty is to look to the safety and welfare of the traveling public who may choose to patronize it. It should not be delayed in its rapid transit by trespassers upon its track, whose presence may impede and endanger its patrons.

It does not follow that it may with impunity run over, injure, and destroy persons wrongfully upon its road.

The right to inflict wanton, willful, or needless harm does not exist. As to persons walking upon its track, and apparently in possession of their faculties, it is not bound to slacken the speed of its trains, but may warn them by proper signals, and rely upon their instinct of self-preservation to take them from danger. As to a person, although wrongfully upon its road, known by a railroad company to be both blind and deaf, it would clearly be its duty to stop its train and remove the intruder.

So of a person asleep, or helpless, or unjudging upon its track. Upon discovering him, as the presumption is that he cannot help himself, it becomes the duty of the company and its employees to use all reasonable care, by stopping its train, so as to prevent injury to one helpless to save himself from impending danger. At other than places upon its road where persons have a right to be, the company is not bound, except in behalf of its own passengers, to watch for trespassers upon its track, but if at any time, and at any place, it discovers per-

sons upon its road, apparently unable to protect themselves from its passing trains, it becomes its bounden duty to use all reasonable care and diligence to prevent their being injured; and failing in this duty, it will become liable for injury to such persons, although they may have been guilty of contributory negligence, the injury being in such cases attributed to the willful or wanton act of the company, as the proximate cause, and not to the negligence of the injured party.

For trespassers, a railroad company is not bound to be watchful, hence no presumption of negligence arises from the absence of such care as to such persons.

As to a trespasser upon the road, who is injured, being himself negligent, the evidence should show, not merely that he might have been seen, but that he was in fact seen, in time and under circumstances rendering it the duty of the company to check the progress of its train, before it can be held liable for an injury to such wrong-doers.

The testimony on behalf of plaintiff failed to show that when he was discovered on its road defendant failed in its duty. The only testimony to that point served to show that the alarm signal was given by the usual short, sharp blasts from the steam-whistle, and that the train was suddenly stopped—more suddenly than when passing at a station.

If we look to the evidence of defendant, plaintiff's case is not helped.

The substance of the engineer's testimony is, that on Sunday afternoon, July 23, 1882, as he was going south with his train, his attention was first attracted by an object ahead and near the track, which afterward proved to be a bundle of blankets; that a little later he saw another object further in advance, which seemed like a man, and which he discovered to be a man; that he jumped from his seat, jumped for his reverse lever, threw it off, put on the air-brakes, and having reversed his engine, opened the throttle and gave it steam; that his fireman also applied the tender-brake. He says this was all that could be done to stop the train. That instantly upon seeing the man he did all in his power to stop, but was unable to do so, before the engine reached him.

Where the question of contributory negligence is left in doubt by the evidence, it should be submitted to the jury under proper instructions, but where the evidence is clear as to the facts, the question of contributory negligence is one of law for the court: Fernandes v. Sacramento Railway Company, 52 Cal. 45.

Under the rule as enunciated by this court in Needham v. S. F. & S. J. R. R. Co., 37 Cal. 409; Kline v. C. P. R. R. Co., Id. 400; Manumus v. Champion, 40 Id. 121; Tennenbrock v. S. P. C. R. R. Co., 59 Id. 271, and which we do not understand to be in conflict with the principles declared in Meeks v. S. P. R. R. Co., 56 Id. 513, we are of opinion that upon the facts as presented by the plaintiff a nonsuit should have been granted, and that upon the verdict of the jury, a new trial should have been awarded to defendant, and consequently that the judgment and order denying a new trial should be reversed, and a new trial ordered.

BELCHER, C. C., and FOOTE, C., concurred.

By the COURT. For the reasons given in the foregoing opinion the judgment and order are reversed and the cause remanded for a new trial.

IN RE YICK WO, ON HABEAS CORPUS.

In Bank. Filed December 28, 1885.

LAUNDRY ORDINANCES, VALIDITY OF—REGULATION OF USE OF WOODEN BUILDINGS. Under section 2 of article 11 of the constitution, and section 74 of the act of April 19, 1856, usually known as the consolidation act, the board of supervisors of the city and county of San Francisco has authority to prohibit or regulate all occupations which are against good morals, contrary to public order and decency, or dangerous to the public safety. In the exercise of such power they have the right to establish fire limits, and to interdict the construction of wooden buildings within certain specified bounds, and also to regulate the use of such buildings. Consequently, order No. 1569 and section 68 of order No. 1587 of such board, which interdicts the establishing, maintaining, or carrying on of laundries, except by consent of the board of supervisors, save in brick or stone buildings, is a valid exercise of such power. Such orders have not been repealed by the subsequent order of the board, No. 1767, regulating the establishment and maintenance of public laundries and wash-houses within certain limits.

RULES FOR THE CONSTRUCTION OF ORDINANCES AND ORDERS of a municipal corporation are the same as for statutes of the legislature.

REPEAL OF STATUTES BY IMPLICATION.—The repeal of statutes by implication is not favored, and where there is an apparent conflict between two acts, the court should reconcile them if possible; but if this cannot be done, than the last act must govern.

THE SAME—PRINCIPLES OF CONSTRUCTION.—Where a subsequent statute is repugnant to a prior one, the latter operates without any repealing clause as a repeal of the former, or where not repugnant, if it clearly appears that it was intended as a revision or substitution for the former, it will repeal it so far as revised or substituted.

MUNICIPAL ORDINANCE—GENERAL OPERATION—TREATY OBLIGATIONS.—A municipal regulation which applies alike to all persons engaged in a given pursuit, without distinction as to nationality, residence, age, sex, or condition, is not, when otherwise regular and valid, subject to the criticism of being in violation of treaty obligations existing between the United States and China.

APPLICATION for a writ of *habeas corpus*. The opinion states the facts.

L. H. Van Schaick and *D. L. Smoot*, for the petitioner.

Alfred Clarke and *Oliver P. Evans, contra.*

SEARLS, C. 1. Yick Wo, a native of China, came to the United States in 1861, and for twenty-two years last past has been engaged in the laundry business at 349 Third street, San Francisco.

2. Petitioner is an alien, and a subject of the emperor of China.

The petition for a writ of *habeas corpus* was filed August 24, 1885, and a writ issued returnable September 4, 1885. The return shows that petitioner is held by the respondent as sheriff of the city and county of San Francisco, under a conviction and sentence for a violation of section 1 of order 1569, and section 68 of order 1587 of the board of supervisors of the city and county of San Francisco.

Ordinance, or order No. 1569 of the board of supervisors, under which petitioner was convicted, is in the following language:

"ORDER NO. 1569.—PRESCRIBING THE KIND OF BUILDINGS IN WHICH LAUNDRIES MAY BE LOCATED.

"*The people of the city and county of San Francisco do ordain as follows:*

"Section 1. It shall be unlawful from and after the passage of this order for any person or persons to establish, maintain, or carry on a laundry within the corporate limits of the city and county of San Francisco, without having first obtained the consent of the board of supervisors; except the same be located in a building constructed either of brick or stone.

"Sec. 2. It shall be unlawful for any person to erect, build, or maintain, or cause to be erected, built, or maintained, over or upon the roof of any building now erected, or which may hereafter be erected, within the limits of said city and county, any scaffolding without first obtaining the written permission of the board of supervisors, which permit shall state fully for what purpose said scaffolding is to be erected and used, and said scaffolding shall not be used for any other purpose than that designated in such permit.

"Sec. 3. Any person who shall violate any of the provisions of this order shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than one thousand dollars, or by imprisonment in the county jail not more than six months, or by both such fine and imprisonment.

"In board of supervisors, San Francisco, May 24, 1880.

"After having been published five successive days, according to law, taken up and passed by the following vote:

"Ayes—Supervisors Schottler, Mason, Litchfield, Drake, Whitney, Eastman, Fraser, Taylor, Doane, Bayley, Torrey, Stetson.

"JNO. A. RUSSELL, Clerk.

"Approved, San Francisco, May 26, 1880.

"I. S. KALLOCH,

"Mayor and *ex officio* President Board Supervisors."

Section 68 of order 1587, passed July 28, 1880, is in substance and effect the same as section 1 of No. 1569, quoted above.

It is admitted that petitioner had a license, a certificate from the board of fire-wardens, and a certificate from the health-officer, copies of which are on file.

It is further admitted that petitioner applied to the board of supervisors, June 1, 1885, for consent of said board to maintain and carry on his laundry, but that said board refused said consent.

By section 2 of article 11 of the constitution of this state it is provided that "any county, city, town, or township may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws."

By section 74 of the act of April 19, 1856, usually known as the consolidation act, the board of supervisors is empowered, among other things, "to provide by regulation for the prevention and summary re-

moval of nuisances to public health, the prevention of contagious diseases . . . . to prohibit the erection of wooden buildings within any fixed limits where the streets shall have been established and graded; . . . . to regulate the sale, storage, and use of gunpowder, or other explosive or combustible materials and substances, and make all needful regulations for protection against fire. To make such regulations concerning the erection and use of buildings as may be necessary for the safety of the inhabitants."

"Unwholesome trades, slaughter-houses, operations offensive to the senses, the deposit of powder, the application of steam-power to propel cars, the building with combustible materials, and the burial of the dead, may all," says Chancellor Kent, "be interdicted by law, in the midst of dense masses of population, on the general and rational principle that every person ought to so use his property as not to injure his neighbors; and that private interests must be made subservient to the general interests of the community:" 2 Kent's Com. 340.

Every citizen holds his property subject to the proper exercise of the powers and restrictions above referred to.

A large proportion of the laws and ordinances relating to the comfort, safety, health, convenience, good order, and general welfare of the inhabitants of cities and towns, and which we style police laws or regulations, have the effect in a greater or less degree to disturb and curtail individual enjoyment and personal rights.

For the injury which the citizen suffers he is, in contemplation of law, compensated by his share in the general benefits flowing from the regulations found essential to the general welfare. It is but a reasonable restraint upon the use of property in those cases where its unlimited use or enjoyment would produce serious mischief to others.

The right to establish fire limits, and to interdict the construction of wooden buildings within certain specified bounds, is a familiar exercise of the authority usually conferred upon municipal corporations.

In towns like San Francisco, constructed largely of wood, the danger from fire is ever present and overshadowing.

It is not therefore strange that the legislature, in conferring certain powers upon the municipal authorities of the city, included not only the authority to regulate the erection, but also the use of buildings, so far as necessary for the safety of the inhabitants.

To prevent the construction of wooden buildings within the densely inhabited portions of a city may become an imperative duty on the part of the authorities. They may not destroy those already erected. But the use of wooden structures within given limits, for specific and highly dangerous purposes, may become quite as detrimental as the erection of new structures of the same character, and as the power of regulation extends to the use as well as to the erection of wooden buildings, we can discern no assumption of unwarranted authority in the order No. 1569, which interdicts the establishing, maintaining, or carrying on laundries, except by consent of the board of supervisors, save in brick or stone buildings. The business of conducting a laundry

involves a constant use of fires, under circumstances, and perhaps by persons, liable to result in conflagrations; of these facts the supervisors are the judges.

In given instances, under favorable circumstances, the danger of fire from this business may be reduced to a minimum, or may not at all jeopardize the surrounding property. In this last class of cases, no objection can be seen why permits should not be granted, as provided for in order 1569. It has been the practice in municipal corporations to vest the granting of licenses for a variety of objects in the discretion of the corporate authorities, or some of them. Without such authority, boards of health and various other agencies by which the lives and health of citizens and the safety and due enjoyment of their property are protected would be powerless for good.

The argument that the discretion to permit the establishment of laundries in wooden buildings by the supervisors is liable to abuse cannot be held conclusive. No doubt all power is liable to abuse, wheresoever lodged.

In theory, however, as well as in ordinary practice, the persons selected to discharge governmental duties, by reason of supposed qualifications for the several positions in which they are placed, will be found to possess the capacity and integrity essential to a proper administration of the trust reposed in them.

If they prove deficient in these qualifications the evil cannot be remedied by invalidating their acts, performed by virtue of authority vested in them, or, where they have exercised discretionary powers, by impugning their judgment or motives, rather than their right to exercise the discretion.

The board of supervisors, under the several statutes conferring authority upon them, has the power to prohibit or regulate all occupations which are against good morals, contrary to public order and decency, or dangerous to the public safety.

Clothes-washing is certainly not opposed to good morals or subversive of public order or decency, but when conducted in given localities it may be highly dangerous to the public safety. Of this fact the supervisors are made the judges, and having taken action in the premises, we do not find that they have prohibited the establishment of laundries, but that they have, as they well might do, regulated the places at which they should be established, the character of the buildings in which they are to be maintained, etc.

The process of washing is not prohibited by thus regulating the places at which, and the surroundings by which, it must be exercised.

The order No. 1569 and section 68 of order No. 1787 are not in contravention of common right, or unjust, unequal, partial, or oppressive in such sense as authorizes us in this proceeding to pronounce them invalid.

It is next contended that order No. 1569 and section 68 of order 1587 are repealed by order No. 1767, adopted April 8, 1884, and which is in the following language:

"ORDER NO. 1767.—REGULATING THE ESTABLISHMENT AND MAINTENANCE OF PUBLIC LAUNDRIES AND PUBLIC WASH-HOUSES WITHIN CERTAIN LIMITS IN THE CITY AND COUNTY OF SAN FRANCISCO.

"*Preamble.*—WHEREAS, the indiscriminate establishment of public laundries and public wash-houses, where clothes and other articles are cleansed for hire, is injurious and dangerous to public health and public safety, and prejudicial to the well-being and comfort of the community, and depreciates the value of property in those neighborhoods where such public laundries and such public wash-houses are situate;

"Under and in conformity to the authority vested by section 11 of article 11 of the constitution of the state of California, and of subdivision 9 of section 74 of an act entitled 'An act to repeal the several charters of the city of San Francisco, to establish the boundaries of the city and county of San Francisco, and to consolidate the government thereof,' approved April 19, 1856, and the several acts amendatory thereto and supplementary thereof;

"*The people of the city and county of San Francisco do ordain as follows:*

"*Limits Defined.*—Section 1. On and after the passage of this order it shall be unlawful for any person or persons to establish, maintain, or carry on the business of a public laundry or a public wash-house, where clothes or other articles are cleansed for hire, within that portion of the city and county of San Francisco lying and being within the following boundaries: Commencing at the intersection of Devisadero street with the waters of the bay of San Francisco; thence following the bay shore easterly and southerly to the easterly end of Channel street; thence along Channel street in a westerly direction to Potrero avenue; thence southerly along Potrero avenue to Army street; thence westerly along Army street to Dolores street; thence northerly along Dolores street to and across Market street to Ridley street; thence westerly along Ridley street to Devisadero street, and thence northerly along Devisadero street to the bay and point of commencement, without having first complied with the conditions hereinafter specified.

"*Persons Conducting Laundries must Obtain Certificates from Health Officer and Fire-wardens as to the Condition of Premises.*—Sec. 2. It shall be unlawful for any person or persons to conduct or maintain a public laundry or wash-house within the district named in section 1 of this order, without having first obtained a certificate signed by the health-officer of the city and county of San Francisco, that the premises are properly and sufficiently drained, and that all proper arrangements for carrying on the business without injury to the sanitary condition of the neighborhood have been complied with, and particularly that the provisions of section 4 of order No. 1587 of this board have been complied with; also a certificate signed by the board of fire-wardens of the city and county of San Francisco, that the stoves, washing, and drying apparatus, and the appliances for heating smoothing-irons are in good condition, and that their use is not dangerous to the surround-

ing property from fire, and that all proper precautions have been taken to comply with the provisions of order No. 1752, 'to define the fire limits of the city and county of San Francisco, and making regulations concerning the erection and use of buildings in said city and county.'

"*Certificate of Health-officer and Board of Fire-wardens in Regard to Laundries, etc.—No Charge to be Made therefor.*—Sec. 3. It shall be the duty of the health-officer, also of the board of fire-wardens, respectively, upon application from any person or persons proposing to open or conduct the business of a public laundry within that portion of this city and county designated and described in section 1 of this order, to inspect the premises in which it is proposed to carry on said business, or in which said business is being carried on, with a view to ascertaining whether the said premises are provided with proper drainage and sanitary appliances; also whether the provision of order No. 1752 of this board has been complied with, and if found in all respects satisfactory, then to issue to said applicants the certificates provided for in section 2 of this order.

"No charge whatever shall be made or compensation or fee collected or received for the performance of any of the services required by the provisions of this order, in the inspection of premises or the issuance of a certificate, but all such services shall be performed free of charge.

"*Times at Which Laundry Work may not be Performed.*—Sec. 4. No person or persons owning or employed in the public laundries or public wash-houses provided for in section 1 of this order, shall wash or iron clothes between the hours of ten o'clock P. M. and six o'clock A. M., nor upon any portion of that day known as Sunday.

"*No Person Suffering from Infectious Diseases to be Permitted to Sleep, Lodge, or Remain in Any Public Laundry.*—Sec. 5. No person or persons engaged in the laundry business within that portion of this city described in section 1 of this order, shall permit any person suffering from any infectious or contagious disease to lodge, sleep, or remain within or upon the premises used by him, her, or them for the purposes of a public laundry.

"*Penalty.*—Sec. 6. Any person or persons establishing, maintaining, or carrying on the business of a public laundry or a public wash-house, where clothes or other articles are cleansed for hire, within the limits of this city and county, as described in section 1 of this order, without first having complied with the provisions of section 2 of this order, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than one thousand dollars, or by imprisonment of not more than six months, or by both; and any person who shall violate any of the provisions of sections 4 and 5 of this order shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than five dollars nor more than fifty dollars, or by imprisonment not more than one month, or by both such fine and imprisonment.

"*Certificates of Health-officer and Board of Fire Commissioners to be Exhibited in a Conspicuous Place.*—Sec. 7. The certificates from

the health-officer and the board of fire-wardens, as required by section 2 of this order, shall be exhibited in some conspicuous place on the premises, and the same shall be produced on the demand of any officer of the city and county of San Francisco.

"*Police to Enforce Provisions of Order.* Sec. 8. The police authorities are hereby directed to have the provisions of this order strictly enforced.

"*Repeal of All Conflicting Orders.* Sec. 9. Order No. 1691, and all orders or parts of orders in conflict with any of the provisions of this order, are hereby repealed.

"In board of supervisors, San Francisco, April 7, 1884.

"After having been published five successive days, according to law, taken up, and passed by the following vote:

"Ayes—Supervisors Sullivan, Reichenbach, Shirley, Burton, Smith, Griffin, Strother, Lewis, Ranken, James, Ashworth.

"Absent—Supervisor Pond.

"JNO. A. RUSSELL, Clerk.

"Approved, San Francisco, April 8, 1884.

"WASHINGTON BARTLETT,

"Mayor and *ex officio* President Board of Supervisors."

The rule for the construction of ordinances and orders of a municipal corporation are the same as for the statutes of the legislature.

The civil code of this state (section 20) affords no guide for determining the question of the repeal of the acts of municipal corporations, except so far as its rules enunciate general principles, alike applicable to all statutory enactments, general and local.

The law does not favor the repeal of statutes by implication, and where there is an apparent conflict between two acts the court should reconcile them if possible, but if this cannot be done, then the last act must govern: Schofield v. White, 7 Cal. 400; People v. R. R. Co., 28 Id. 254.

Where a subsequent statute is repugnant to a prior one, the latter operates, without any repealing clause, as a repeal of the former; or where not repugnant, if it clearly appears from the latter that it was intended as a revision or substitute for the former, it will repeal it so far as revised or substituted: Pierpont v. Crouch, 10 Cal. 315.

In order for a subsequent act to repeal a former, it should appear from the last act that it was intended to take the place of or repeal the former, or that the two acts are so inconsistent that force and effect cannot be given to both: Ex parte Smith, 40 Cal. 419; Estate of Wixam, 35 Id. 320; People v. Burt, 43 Id. 560; People v. Sargent, 44 Id. 430.

Section 9 of the order No. 1767, expressly repeals "order No. 1691, and all orders or parts of orders in conflict with any of the provisions of this order."

It follows that order No. 1569 is not expressly repealed unless there is a conflict between its provisions and those of the later order or orders. We may dismiss some intermediate orders of the board from

observation, for the reason that we find in them no support for the contention of petitioner not contained in No. 1767.

We fail to find in order No. 1767 evidence of any such repugnance or conflict with No. 1569 as to warrant the conclusion that the latter is repealed by implication.

They may, with propriety, both stand together. No. 1767 fixes the limits within which a public laundry or wash-house shall not be carried on without complying with certain conditions therein specified. These conditions relate to certificates to be procured from the health-officer as to drainage and sanitary conditions, and from the board of fire-wardens showing the stoves, washing, and drying apparatus are in good condition, and not dangerous to surrounding property from fire, etc.

The order also fixes and designates certain hours of the night within which washing and ironing shall not be carried on.

The prominent features of the order consists in the limits which it fixes within which certain restrictions apply. All of these provisions may with propriety be enforced, and the necessity still exist, in the densely settled portions of the town, for this business to be conducted only in buildings of brick or stone.

As order No. 1569 is not expressly repealed by order 1767, and as the latter is not repugnant to, or inconsistent with, the former, we are of opinion it did not repeal the former by implication, and that section 1 of order No. 1569 is still in full force and effect, and applicable alike to all classes and conditions of men engaged, or to engage, in the business therein indicated.

We have not deemed it necessary to discuss the question in the light of supposed infringement of petitioner's rights under the constitution of the United States, for the reason that we think the principles upon which contention on that head can be based have in effect been set at rest by the cases of Barbier v. Connolly, 113 U. S. 27, and Soon Hing v. Crowley, Id. 703.

That this class of orders are not repugnant to our state constitution need not now be discussed, as their validity with reference to that instrument has been sustained in Ex parte Mount, 5 West Coast Rep. 575; Ex parte Moynier, 65 Cal. 33; Ex parte Walters, Id. 269.

A regulation which applies alike to all persons engaged in a given pursuit, without distinction as to nationality, residence, age, sex, or condition, is not, when otherwise regular and valid, subject to the criticism of being in violation of treaty obligations existing between the United States and China.

We are of opinion the petitioner should be remanded to the custody of the sheriff.

BELCHER, C. C., and FOOTE, C., concurred.

By the COURT. For the reasons given in the foregoing opinion the petitioner is remanded to the custody of the sheriff.

No. 8,508.

LAWRENCE *v.* DOOLAN, ADMINISTRATOR, ET AL.

In Bank. Filed December 28, 1885.

TAX COLLECTOR OF SAN FRANCISCO—LIABILITY FOR ASSESSMENTS FOR OUTSIDE LANDS.—For money paid to a tax collector of the city and county of San Francisco, in payment of an assessment levied under order 800 of the board of supervisors, the tax collector's liability to a claimant thereof was as tax collector and not as an individual, and it was his duty to pay it to such claimant upon demand.

THE SAME—STATUTE OF LIMITATIONS, WHEN RUNS AGAINST CLAIMANT.—The statute of limitations did not commence to run against such claimant, and in favor of the sureties on the bond of the tax collector, until it was judicially determined whether or not the claimant was the person to whom the city would deed the land assessed, and might take the money paid to the tax collector and apply it to the purpose contemplated by order No. 800, and the acts of the legislature of March 27, 1868, and of March 14, 1870.

APPEAL from a judgment of the superior court of the city and county of San Francisco, entered in favor of the defendants. The opinion states the facts. The opinion in department is reported in 5 West Coast Rep. 156.

E. A. Lawrence, for the appellant.

Joseph M. Nougues, Mastic, Belcher & Mastic, E. W. McGraw, Tully R. Wise, A. Heynemann and *J. L. Murphy*, for the respondents.

FOOTE, C. In the petition for rehearing the opinion of department two, heretofore delivered and found in 5 West Coast Rep. 156, is not controverted, in so far as it determines that there was no misjoinder of parties defendant, and that two causes of action were not improperly joined. But it is claimed that the conclusion there arrived at was not sound, in that it declared the sureties of Austin, the tax collector, were responsible for the money received by him, in his official capacity, from Mrs. Lawrence, the plaintiff, and that the statute of limitations did not bar her right of action against them.

In reference to the duties of the tax collector in a matter of this kind, where the action was brought against him alone, this language is used by this court in Randall v. Austin, 46 Cal. 62: "Practically it is a mere deposit of the taxes and assessments by each to await the result of the controversy in the courts, and though it is not expressly provided that the unsuccessful party may withdraw his deposit, we have not the least doubt that such was the intention of the legislature. It could not have been intended that the taxes and assessments should be twice paid, as we think is perfectly apparent from the whole scope and spirit of the act.

"When it appeared from the record of the proceedings of the board that the controversy was ended the unsuccessful party was entitled to withdraw his deposit. If the consent of the board was necessary before he could withdraw the money, the plaintiff in this case obtained it. His petition to that effect was granted, and the clerk was directed to return his papers, including the tax collector's receipts.

"This was a sufficient authority to the defendant to refund the money, and would have protected him from further responsibility.

"The rule that voluntary payments cannot be recovered back has no application to the case, nor is there any force in the argument that the action should have been brought against the city and county instead of the tax collector."

In the case in hand the demurrer admits that the money was never paid over to the city, and if it was his duty so to do, which we do not now decide, the tax collector nevertheless, by not paying it over, was responsible to the rightful owner.

Are his sureties on his official bond responsible in this action?

It is alleged in the complaint, and admitted by the demurrer, that Austin entered upon his duties as tax collector on the twenty-third of November, 1868; that he executed his bond, with the defendants, except the city and county of San Francisco, as sureties, on that day, and that the conditions of this bond were for the faithful performance and execution of the duties of tax collector of the city and county of San Francisco as required by law then existing, as well as those which might be required by any law enacted subsequently to the execution of said bond. That the moneys assessed to plaintiff under order 800 were paid to Austin on the third day of March, 1870, for which on that day his receipt was given in writing.

As we have seen, the law by which the duty of collecting such assessments was imposed upon Austin, as tax collector, was enacted on the twenty-seventh of March, 1868.

This was about nine months before he gave his bond with sureties.

As we understand the decision of this court in Randall v. Austin, it declared *inter alia* that the latter's responsibility to a claimant of such moneys as those now in controversy was as tax collector, and not as an individual.

That being so, such cause of action must necessarily flow from the violation of a duty as such officer, for the due and proper performance of which his sureties have obligated themselves to be responsible. Austin as tax collector received the plaintiff's money, and neither paid it to the city and county treasurer nor to her. It was his duty as tax collector, the city and county having absolved him from all responsibility, to have paid it to the plaintiff on her demand. And it makes no material difference whether this duty was imposed by the act of 1868, passed before he executed his bond, or under that of 1870, enacted after that occurrence. His sureties undertook to be responsible for the due performance of all such duties as were imposed upon Austin by virtue of his office, whether the same were attached to it, as such, before or after the bond was executed: People v. Edwards, 9 Cal. 292.

As to the statute of limitations, we think it very clear that the plaintiff had no right to bring an action for her money until it was judicially determined whether or not she was the person to whom the city would deed the land, and might take the money she had paid into the tax collector, and apply it to the purpose contemplated by order No. 800 and the acts of the legislature, *supra*.

When in February, 1878, it was thus determined that she had no right to demand of the city a deed to the lands in controversy between her and Ballou, she could then have demanded her money, and her right of action accrued.

The present action was commenced January 14, 1880, and was not barred by the statute of limitations.

We are of opinion that in this action the sureties were liable to the plaintiff, and concur fully in the opinion of department two of this court, *supra*, that the judgment should be reversed and cause remanded, with directions to overrule the demurrer, with leave to answer.

BELCHER, C. C., and SEARLS, C., concurred.

By the COURT. For the reasons given in the foregoing opinion, judgment reversed and cause remanded, with direction to overrule the demurrer, with leave to defendants to answer.

No. 9,341.

DILLON *v.* SALOUDE ET AL.

Department One. Filed December 28, 1885.

PURCHASE OF STATE LANDS—CONTEST BETWEEN APPLICANTS—ALLEGATIONS OF PLEADINGS.—In an action to determine a contest, arising in the surveyor-general's office, as to which of the parties is entitled to purchase certain school land from the state, each party is an actor, and must state in his pleadings all the facts upon which he relies as showing his right to become the purchaser, and the steps he has taken to avail himself of and secure his right to make the purchase; and failing so to do, he has no standing in court.

THE SAME—LANDS NOT FIT FOR CULTIVATION—ACTUAL SETTLER.—Article 17, section 3 of the constitution of 1879, providing that "lands belonging to the state, which are suitable for cultivation, shall be granted only to actual settlers," prohibits the sale of any land belonging to the state, which is suitable for cultivation, to one who is not an actual settler thereon, even though his application to purchase was made before the constitution was adopted, and when settlement was not required. But it does not prohibit the sale of land to one who was an actual settler thereon, though the fact of his settlement was not stated in the affidavit accompanying his application, nor does it prevent, or in any way affect, the sale of lands which were not suitable for cultivation.

THE SAME—APPLICATION FOR PURCHASE—CONTENTS OF.—Section 3495 of the political code, as amended in 1880, requiring that any one desiring to purchase any portion of a sixteenth or thirty-sixth section shall state in his affidavit, among other things, "that he is an actual settler thereon," does not cancel or make void any application to purchase theretofore filed. It applies only to applications thereafter to be made, and leaves those before made as they would have been if the amendment had not been passed.

THE SAME.—An application to purchase state lands, not fit for cultivation, made prior to the amendment of 1880 to section 3495 of the political code, was not required to state that the applicant was an actual settler on the land.

APPEAL from a judgment of the superior court of Mendocino county, entered in favor of the plaintiff. The opinion states the facts.

T. L. Carothers and *E. D. Sawyer*, for the appellant.

J. A. Cooper, for the respondent.

BELCHER, C. C. This action was commenced to determine a contest arising in the surveyor-general's office, and referred to the court below

as to which of the parties was entitled to purchase from the state a certain half-section of school land.

In the complaint it is alleged that the plaintiff made his application to purchase the land on the thirteenth day of February, 1883, and filed therewith his affidavit, setting forth all the facts required by the statute at that time, and among others that he was an actual settler on the land; that the defendant Saloude filed his affidavit and application to purchase the land on the twenty-third day of October, 1875, but that he never at any time was a settler thereon, or in the occupation of any part thereof; that the defendant St. Leger filed his affidavit and application to purchase the land on the tenth day of April, 1877, but that he never was a settler thereon, never resided thereon, and never was in the occupation of any part thereof.

The complaint did not allege that the land was suitable for cultivation.

The defendant Saloude demurred to the complaint, and his demurrer was overruled, and thereupon he declined to answer.

The defendant St. Leger answered, setting up his application to purchase the land on the tenth day of April, 1877, and the facts stated in his affidavit, which were all the facts required by the statute then in force to be stated. He then alleged that the land was not suitable for cultivation, but did not allege that he was ever a settler thereon.

The plaintiff demurred to the answer, on the ground that it did not state facts sufficient to constitute a defense to the action, or to show that the defendant was entitled to purchase the land in controversy.

The court sustained the demurrer, and thereupon, after hearing testimony on the part of the plaintiff, entered judgment that the plaintiff was, and the defendants were not, entitled to purchase the land from the state.

The appeal is by St. Leger from this judgment.

The only question presented for decision is, Did the answer of the appellant state facts, which, being proved, entitled him to purchase the land?

In cases of this kind each party is an actor, and "must state in his pleadings all the facts upon which he relies as showing his right to become the purchaser, and the steps he has taken to avail himself of and secure his right to make the purchase," and failing to do that he has no standing in court: Cadierque v. Duran, 49 Cal. 356; Ramsey v. Flournoy, 56 Id. 260.

It is not denied that appellant's application was in all respects proper and sufficient at the time it was made, but it is claimed that after the adoption of the new constitution in 1879, and the amendment of section 3495 of the political code, on the twenty-eighth of April, 1880, the land could only be sold to an actual settler thereon, and that as appellant's answer failed to state that he was an actual settler on the land, it was wholly insufficient.

In support of this view, counsel for respondent cites Johnson v. Squires, 56 Cal. 103; and Urton v. Wilson, 65 Id. 11.

The constitution provides that "lands belonging to this state, which

are suitable for cultivation, shall be granted only to actual settlers:" Art. 17, sec. 3.

This prohibited and made unlawful the sale of any land belonging to the state, which was suitable for cultivation, to one who was not an actual settler thereon, even though his application to purchase it was made before the constitution was adopted, and when settlement was not required. But it did not prohibit the sale of land to one who was an actual settler thereon, though the fact of his settlement was not stated in the affidavit accompanying his application.

Nor did it prevent, or in any way affect the sale of lands which were not suitable for cultivation.

Section 3495 of the political code, as amended in 1880, requires that any one desiring to purchase any portion of a sixteenth or thirty-sixth section shall state in his affidavit, among other things, "that he is an actual settler thereon; . . . . that he desires to purchase the same for his own use and benefit, and for the use and benefit of no other person or persons whomsoever; and that he has made no contract or agreement to sell the same."

The words quoted were added to the section, and "are to be considered as having been enacted at the time of the amendment," while "the portions which are not altered are to be considered as having been the law from the time when they were enacted:" Pol. Code, sec. 325.

While the state may sell its lands to whom it pleases, and upon such terms and conditions as it chooses to prescribe, there is nothing in the amendment showing any intention on the part of the legislature to cancel or make void any application theretofore filed.

The amendment applies only to applications thereafter to be made, and leaves those before made as they would have been if the amendment had not been passed.

This being so, the facts stated in appellant's answer were sufficient, and he was entitled to purchase the land, his other averments being true, if it was not suitable for cultivation. Whether it was suitable for cultivation or not was a question of fact, which should have been found by the court.

The cases cited by counsel for respondent are not in conflict with the views here expressed. In neither of them was it claimed that the land was not suitable for cultivation, and the cases were, therefore, decided upon the assumption that it was suitable.

We think the court erred in sustaining the demurrer to the answer, and the judgment should therefore be reversed.

SEARLS, C., and FOOTE, C., concurred.

By the COURT. For the reasons given in the foregoing opinion the judgment is reversed, with directions to overrule the demurrer to the answer.

No. 9,320.

IN RE ESTATE OF MOORE, DECEASED.

Department One. Filed December 28, 1885.

INSANITY OF OFFICER—VACANCY, WHEN CREATED—COMMISSION OF LUNACY.—Section 996 of the political code, providing that an office becomes vacant on the happening of the incumbent's insanity, "found upon a commission of lunacy issued to determine the fact," only applies to a commission issued out of chancery, and not to the ordinary statutory proceeding taken to send a person to the insane asylum.

THE SAME—INSANITY OF ADMINISTRATOR—COMMITMENT TO ASYLUM—VACANCY IN ADMINISTRATION.—The commitment of an administrator to the insane asylum does not create an entire vacancy in the administration of the estate, under sections 1425 and 1426 of the code of civil procedure. During such commitment the administrator is incapable of executing his trust; but when his incapacity had been removed and he had again entered upon the discharge of his duties as administrator, a petition asking for the appointment of another person, on account of the former incapacity of the administrator, comes too late.

APPEAL from an order of the superior court of Santa Cruz county refusing a petition for the appointment of an administratrix. The opinion states the facts.

C. B. Younger and *F. J. McCann*, for the appellant.

John C. Hall and *Arthur Rogers*, for the respondent.

BELCHER, C. C. This is an appeal by Helen M. Moore from an order refusing to appoint her administratrix of the estate of her deceased husband. The facts, as shown by the record, are as follows:

William H. Moore died intestate in the month of October, 1871, leaving a widow and five minor children, four of whom were the issue of a former marriage. He resided at the time of his death in the county of Santa Cruz, and left estate, real and personal, therein.

In March, 1872, Thomas W. Moore, a brother of deceased, was appointed, at the request of the widow, administrator of the estate. He at once qualified and entered upon the discharge of his duties as administrator, and continued to act as such until the twenty-eighth day of April, 1881, when, by order of one of the judges of the superior court of the city and county of San Francisco, he was sent to the Napa state asylum for the insane as an insane person. He remained in the asylum until the twenty-eighth day of December following, when he left it with the consent of the resident physician, cured.

On the twentieth of April, 1882, he received from the resident physician a certificate of discharge from the asylum, and on the twenty-fifth of July, 1882, in a proceeding commenced in the superior court of the city and county of San Francisco, under the provisions of section 1766 of the code of civil procedure, he was by the court found and adjudged to be of sound mind, and capable of taking care of himself and his property.

No other administrator being appointed, after he left the asylum he continued to act as administrator of the estate, and on the sixteenth of September, 1882, he filed his account of his administration from its commencement. To this account Willie Moore, minor son of the petitioner here, filed objections on the eleventh day of October, 1882.

The issue growing out of the account and objections were subsequently tried and submitted to the court, but on the twentieth day of April, 1883, when this case was tried, had not been decided.

On the sixteenth day of March, 1883, Helen M. Moore, the widow of deceased, presented her petition to the court below, setting forth, among other things, that Thomas W. Moore was committed to an insane asylum, and since that time no order had been made appointing any person as the administrator of the estate of William H. Moore, deceased; that the estate was still unsettled and undistributed; that no account of Thomas W. Moore's administration of the estate had been settled or allowed; and praying that she be appointed administratrix of the estate, and that letters be issued to her.

Thomas W. Moore answered to the petition, and upon the issues thus raised, the case was tried and the prayer of the petition denied.

The question for decision is, Did the fact that the respondent was sent to an insane asylum create an absolute vacancy in the administratorship of the estate? If not, the appellant, having renounced her right to administer in favor of the respondent, cannot now retract her renunciation, and her petition for letters was properly denied: Estate of Kirtlam, 16 Cal. 162; Estate of Hamilton, 34 Id. 464; Estate of Kearn, 56 Id. 407.

In support of her contention, the appellant cites section 996 of the political code, and sections 1425 and 1426 of the code of civil procedure.

The section cited from the political code provides that an office becomes vacant on the happening of the incumbent's insanity "found upon a commission of lunacy issued to determine the fact." That section is not in point, for, conceding that it applies to officers of court, such as administrators and receivers, and is not confined, as claimed by respondent, to officers of a political character, still the insanity must be found by a commission of lunacy. That is a commission issued out of chancery, and is not the ordinary proceeding taken to send one to an insane asylum: 1 Burrill's Law Dict. 318; opinion of Lewis, J., in State v. McClintock, 5 Nev. 329.

The sections cited from the code of civil procedure provide that if one of several executors or administrators dies, becomes lunatic, is convicted of an infamous crime, or otherwise becomes incapable of executing the trust, the remaining executors or administrators must proceed to complete the execution of the will or administration; and if all the executors or administrators die or become incapable, the court must issue letters to others.

Under these sections we do not think an entire vacancy in the administration of the estate was created when the respondent was sent to the asylum. He became incapable of executing the trust for the time being, and if during that time the appellant had petitioned for letters she would doubtless have received them. But when his incapability was removed, and he had again entered upon the discharge of his duties as administrator, and had been recognized as such by the court and others, we think the petition came too late.

The order should be affirmed.

FOOTE, C., and SEARLS, C., concurred.

By the COURT. For the reasons given in the foregoing opinion the order is affirmed.

No. 9,133.

DOUGHERTY *v.* NEVADA BANK OF SAN FRANCISCO.

Department One. Filed December 28, 1885.

OPENING DEFAULT JUDGMENT—DISCRETION OF COURT.—It is within the legal discretion of the trial court to grant motions to open defaults, or the contrary, and in the absence of an abuse of such discretion its action will not be reversed.

THE SAME—EXCUSABLE ABSENCE OF ATTORNEY—SURPRISE.—Where judgment by default is taken against the defendant, in his absence and that of his counsel, an order setting aside such judgment will not be reversed, if it appears that the absence of counsel was due to his excusable neglect, and that he was taken by surprise.

APPEAL from an order of the superior court of the city and county of San Francisco opening a default judgment. The opinion states the facts.

J. C. Bates, for the appellant.

W. H. L. Barnes, for the respondent.

FOOTE, C. This is an appeal from an order vacating a judgment obtained against the defendant in its absence and that of its counsel.

The notice that a motion would be made to set aside the judgment stated the ground thereof to be "that the same was rendered improvidently, and that the defendant has a good and substantial defense to said action on its merits."

J. C. Flood made an affidavit, which was duly served, filed, and read, in support of the motion, which, among other things, contained this statement: "That he is an officer, to wit, the president, of the said defendant in the above-entitled action; that he has fully and fairly stated the case in said action to W. H. L. Barnes, esq., his attorney and counselor, residing in said city and county, his office being 426 California street therein, and after such statement he is advised by his counselor and verily believes that he has a good and substantial defense on the merits to said action."

F. V. Bell, the managing clerk of W. H. L. Barnes, esq., who seems to have attended to the matter in hand for his principal, made affidavit which showed that the plaintiff had not been active in bringing the cause on for trial, but the defendant had; that by a mistake this cause did not appear upon the calendar on the day set for its trial, and that intending to serve a second notice to set the case for trial at another day, supposing the first notice had been mislaid by the clerk of the court, he found that judgment had already been entered; that he had no knowledge of any day having been set for the trial of this cause other than the date mentioned in the notice he had given, and there-

fore could not and did not appear; that he was familiar with the case, and verily believes the defendant has a good and substantial defense on the merits of said action.

This court has often held that it is within the legal discretion of a trial court to grant motions to open defaults, or the contrary, and that in the absence of an abuse of such discretion by that tribunal its action should not be reversed.

It has even said this, speaking of the province of a trial court: "When the circumstances are such as to lead the court to hesitate upon the motion to open the default, it is better, as a general rule, that the doubt should be resolved in favor of the application:" Watson v. S. F. & H. B. R. R. Co., 41 Cal. 17; see also Wood v. Backus, 20 Id. 138.

In the case in hand it seems to us that the judge below, from the affidavits, might reasonably have inferred that the attorney of the defendant was taken by surprise, and that the judgment was obtained through his excusable neglect; that the defendant had a meritorious defense, and had been so informed by counsel. It may be that, strictly speaking, those affidavits might have been more technically and nicely drawn, and such is the better practice, but it is not always possible.

The court below exercised a reasonable and legal discretion, and did so in consonance with the heretofore expressed opinions of this court, that section 473, code of civil procedure, should be liberally construed to meet the ends of justice, and we are of opinion that its order in the premises should be affirmed.

BELCHER, C. C., and SEARLS, C., concurred.

By the COURT. For the reasons given in the foregoing opinion the order is affirmed.

DEFAULT, WHEN MAY BE OPENED.—It is no abuse of discretion for a court to set aside a default judgment, rendered in the absence of opposing counsel through a misapprehension as to when the trial would occur: Cameron v. Carroll, 7 West Coast Rep. 567.

No. 9,088.

NISSEN *v.* BENDIXSEN.

Department One. Filed December 28, 1885.

HUSBAND'S LIABILITY FOR NECESSARIES FURNISHED WIFE—LIABILITY, HOW ALLEGED. The complaint, in an action brought against a husband for necessaries furnished his wife, under section 174 of the civil code, must allege that the goods were sold and delivered to the defendant. An averment in respect to furnishing the goods to the wife, etc., is not sufficient. The absence of such necessary averment may be taken advantage of on appeal, although no demurrer to the complaint was filed.

APPEAL from a judgment of the superior court of Humboldt county, entered in favor of the plaintiff, and from an order denying the defendant a new trial. The opinion states the facts.

S. M. Buck and *Cope & Boyd*, for the appellant.

J. J. De Haven and *Charles F. Hanlon*, for the respondent.

FOOTE, C. This action was brought against a husband for necessaries furnished his wife, under the provisions of section 174, civil code. A jury being waived, the court rendered judgment in favor of the plaintiff for part of his demand. From that, and from an order refusing him a new trial, defendant Bendixsen appeals.

The testimony of the plaintiff's witnesses was all by depositions. The defendant appeared and gave evidence in open court. There is a conflict in their testimony. When this is the case, it is a settled rule of law, as declared by this court in numerous instances, that for such reason alone a judgment will not be reversed.

But the further point is made that the complaint therein does not state facts sufficient to constitute a cause of action, and will not support a judgment such as the one rendered.

It is claimed that although section 174 of the civil code gives a right of action it confers no other or greater right than that which existed at common law, and that it did not intend to change, nor does it change, the rule of pleading as to averments which were necessary in such a case at common law.

The compaint does not allege that the articles were sold to the husband, defendant, or that they were furnished his wife upon his credit.

Upon a pleading resembling the one in hand the opinion of this court was expressed in Jacobs v. Scott, 53 Cal. 74, as follows: "The complaint does not allege a sale and delivery of goods to defendant. Whether the defendant is liable for the goods furnished to the wife or not, it is certain that plaintiffs cannot recover against him their value, in the absence of an averment that they were sold and delivered to him. If she was authorized by reason of her relation to her husband, the nature and character of the goods, and the husband's circumstances to purchase them, the goods were in law sold to defendant, and the averments should have been to that effect. The averments in respect to furnishing the goods to his wife, etc., might have been omitted as mere evidence, and not the statement of ultimate facts."

In the case under consideration no demurrer to the complaint was filed, but under section 434 of the code of civil procedure the objection now taken to that pleading may be entertained by this court.

We are of opinion that the judgment and order should be reversed, and cause remanded, with leave to the plaintiff, if so minded, to amend his complaint.

BELCHER, C. C., and SEARLS, C., concurred.

By the COURT. For the reasons given in the foregoing opinion the judgment and order are reversed and cause remanded, with leave to plaintiff, if so advised, to amend his complaint.

HUSBAND'S LIABILITY FOR NECESSARIES FURNISHED WIFE.—It is a well-established principle of the common law, and has been recognized by statute in many of the United States, that a husband, so long as the wife has not forfeited her right by adultery or elopement, is bound to supply her with the necessaries of life. This rule is generally sought to be applied where the husband and wife are shown not to live amicably with each other; for the fact of such amicable living is evidence that he does supply her with.

necessaries. Such evidence is, however, not conclusive. And if, during cohabitation, he fails or refuses to furnish her with necessaries, others may do so, even against his express orders, and he will be liable therefor: Compton v. Bates, 10 Brad. App. 78; Allen v. Aldrich, 29 N. H. 63; Morris v. Palmer, 39 Id. 123; Hultz v. Gibbs, 66 Pa. St. 360; Harttman v. Tegart, 12 Kan. 177; Garland v. Garland, 50 Miss. 694; Litson v. Brown, 26 Ind. 489; Dixon v. Hurrell, 8 Car. & P. 717; Atkyns v. Pearce, 2 Com. B., N. S., 763; Cunningham v. Irwin, 7 Serg. & R. 247; Thompson v. Hervey, 4 Burr. 2177; Liddlow v. Wilmot, 2 Stark. 86; Kinsey v. Kinsey, 37 Ala. 393; Fredd v. Eves, 4 Harr. 385; Norcross v. Rodgers, 30 Vt. 588; Boulton v. Prentice, 2 Stra. 1214; Baker v. Brown, 8 Johns. 72; Zeigler v. David, 12 Ala. 127; Kenyon v. Farris, 47 Conn. 510; Thorne v. Kathan, 51 Vt. 520; McGahey v. Williams, 12 Johns. 293; Mahew v. Thayer, 8 Gray, 172; Schnuckle v. Bierman, 89 Ill. 454; Rotch v. Miles, 2 Conn. 638; Pearson v. Darrington, 32 Ala. 227. This liability of the husband continues even after the death of the wife. Thus in Cunningham v. Reardon, 98 Mass. 538, where the wife had been compelled to leave the husband on account of his cruelty, he was held liable for her funeral expenses. In this case the court said: "He is liable without notice of her death. This does not depend upon the doctrine of agency; if it were so, the consequences would be that the agency would end with the life of the agent, and the defendant be absolved. But it is rather an authority to do for him what law and duty require him to do, and which he neglects and refuses to do for himself; and is applicable as well to supplies furnished to the wife when she is sick, insensible, or insane, and to the care of her lifeless remains, as to contracts expressly made by her."

What are necessaries depends largely on circumstances. In general, "whatever naturally and reasonably tends to relieve distress, or materially, and in some essential particular to promote comfort either of body or mind, may be deemed to be a necessary for which a wife, under proper circumstances, may pledge her husband's credit:" Conant v. Burnham, 133 Mass. 503; 2 Smith's Lead. Cas., 8th ed., 510. Thus it has been held that food and drink are necessaries: Thorpe v. Shapleigh, 67 Me. 235; Descelles v. Kadmus, 8 Iowa, 51; Walker v. Simpson, 7 Watts & S. 83. So also as to a dwelling or other place of residence: Walker v. Simpson, 7 Watts & S. 83; Rotch v. Miles, 2 Conn. 638; and furniture: Henly v. Sargent, 54 Cal. 396; Hunt v. De Blaquiere, 3 Moo. & P. 108; and medical attendance, including dentistry: Freeman v. Holmes, 62 Ga. 556; Cochran v. Lee, 24 Ala. 380; Harrison v. Grady, 14 Week. R. 139; Zeigler v. David, 23 Ala. 227; Bevier v. Galloway, 71 Ill. 517; Harttman v. Tegart, 12 Kan. 177; Spann v. Mercer, 8 Neb. 357; but not a quack doctor: Wood v. O'Kelley, 8 Cush. 406. Clothing, appropriate to the condition of the parties were they living together, is a necessary: Breinig v. Meitzler, 23 Pa. St. 156; Freestone v. Butcher, 9 Car. & P. 643. But a pew in church is not a necessary: Parish v. Bronson, 40 Conn. 75; nor is a present bought for a friend: Sutter v. Mustin, 50 Ga. 242. Whether a sewing-machine is a necessary is a question of fact for the jury: Willey v. Beach, 115 Mass. 559; McQuillen v. Singer Mfg. Co., 99 Pa. St. 586; and generally the question as to what is a necessary is for the jury: Willey v. Beach, 115 Mass. 559; Raynes v. Bennett, 114 Id. 424. In this latter case the court left it to the jury to determine whether articles of jewelry purchased by the wife while living with the husband were necessaries.

In general, however, it may be said that necessaries consist of articles for use, and not for ornament. Money advanced to the wife is not a necessary, although she uses it for the purchase of necessary food or clothing, and the like. At law the lender cannot recover it from the husband: Walker v. Simpson, 7 Watts & S. 83; Knox v. Bushel, 3 Com. B., N. S., 334; Carle v. Peale, Salk. 386; Paule v. Goding, 2 Fost. & F. 585; Gilbert v. Plant, 18 Ind. 308; Zeigler v. David, 23 Ala. 127; but in equity he may: Jenner v. Morris, 3 DeG. F. & J. 45; Deare v. Souttin, L. R. 9 Eq. 151; Kenyon v. Farris, 47 Conn. 510. Whether an attorney's fee is a necessary has occasioned a difference of opinion. In Illinois it has been held not: Dow v. Eyster, 79 Ill. 254. But the contrary has been held in Iowa in reference to an attorney's fee to defend a wife in a libel in divorce for adultery: Porter v. Briggs, 38 Iowa, 166. In Wisconsin, also, the husband was held liable for the fees of the wife's attorneys, in an action brought by him to compel her to keep the peace: Warner v. Heiden, 28 Wis. 517; and the same has been held in Massachusetts as to an action brought by the husband against the wife to have her declared a common drunkard: Conant v. Burnham, 133 Mass. 503. The husband is liable for necessaries furnished the wife during his lunacy: Read v. Legard, 4 Eng. L. & Eq. 523; Richardson v. Strong, 13 Ired. 107; Alexander v. Miller, 16 Pa. St. 220; Wray v. Cox, 24 Ala. 337; or infancy: Dunbar v. Meyer, 43 Miss. 679; Cantine v. Phillips, 5 Harr. 428. Where the husband has constituted the wife his agent, he is liable, on the general principles of agency, for all contracts made by her within the scope of her authority, whether for necessaries or not.

No. 9,215.

HARRISON v. MCCORMICK ET AL.

Department One. Filed December 28, 1885.

PLEADINGS—CROSS-COMPLAINT AND ANSWER SHOULD BE DISTINCT.—A cross-complaint should be as distinct and separate from an answer in the same case as any other independent pleading in the cause. Each must stand or fall upon its own merits.

THE SAME—WAIVER OF FORMAL OBJECTION TO CROSS-COMPLAINT.—An objection that an answer and cross-complaint were both joined in the same pleading is waived, if the plaintiff consented in writing to allow such pleading to be filed and stand as and for defendants' answer and cross-complaint.

APPEAL from a judgment of the superior court of the city and county of San Francisco, entered in favor of the plaintiff. The opinion states the facts.

Castlehun & Firebaugh, for the appellants.

Craig & Meredith, for the respondent.

SEARLS, C. This is an action to recover a balance due on a contract for the sale and delivery of fifty tons of coal. Plaintiff had judgment, and defendants appeal therefrom and from an order denying a new trial, and from an order refusing to strike out plaintiff's cost bill.

We think this cause must be reversed and a new trial ordered.

Defendants filed what is denominated an "amended answer and cross-complaint," in which they first deny the allegations of the complaint, and then proceed to set up matters, some of which at least, if not all, might have been pleaded as a defense to the action, or as a counter-claim, or as a cross-complaint. The pleading closes by demanding affirmative relief, as in an ordinary cross-complaint.

We should, under ordinary circumstances, decline to treat the pleading as a cross-complaint requiring to be answered, for the want of a separate and distinct setting out of the matters contained in it. A cross-complaint should be as distinct and separate from an answer in the same case as any other independent pleadings in the cause. Each must stand or fall upon its own merits.

The very objections, however, which might otherwise be urged to the pleading seem to be waived in the acceptance of service by plaintiff's attorneys; such acceptance reads as follows:

"Service of within admitted made this second day of December, 1882, and we consent that the same be filed and stand as and for defendant's answer and cross-complaint herein.

"CRAIG & MEREDITH, Plaintiff's Attorneys."

The parties having treated the pleading as a cross-complaint, we do not feel at liberty to strangle it because of its hybrid character.

To this cross-complaint there is no answer on file. Treating its allegations as true, plaintiff was not entitled to a judgment.

The judgment should be reversed and leave granted the parties to amend their pleadings if so advised, and for plaintiff to answer the cross-complaint.

BELCHER, C. C., and FOOTE, C., concurred.

By the COURT. For the reasons given in the foregoing opinion the judgment is reversed and cause remanded, with leave to the respective parties to amend their pleadings if so advised.

No. 8,546.

DEMARTIN *v.* ALBERT.

Department One. Filed December 28, 1885.

PLEADING—GENERAL DEMURRER—AMBIGUITY.—The division of a complaint into a number of counts does not, of itself, constitute an ambiguity or uncertainty which can be taken advantage of by general demurrer. The particular matter constituting an ambiguity in a pleading must be pointed out by a special demurrer. If that be not done a general demurrer on that ground may be disregarded.

CROSS-COMPLAINT—ALLEGATION OF TRESPASS ON LAND.—A cross-complaint states a cause of action for trespass to defendant's lands, if it shows actual possession by the defendant at the commencement of the action of certain land and premises inclosed by a good and substantial inclosure; unlawful entry thereon by the plaintiff with bands of sheep, with which he, against the consent of defendant, depastured the land to his damage. A further allegation that such trespass was committed "contrary to the provisions of an act of the legislature of the state of California, entitled 'An act to restrict the herding of sheep, approved May 18, 1861,'" may be disregarded as surplusage or stricken out.

THE SAME—CROSS-COMPLAINT—TRESPASS TO LAND—ACTION FOR PERSONAL INJURIES. In an action to recover damages for injuries inflicted on plaintiff's sheep, the defendant cannot file a cross-complaint to recover damages for a trespass committed on his land, when there is nothing in the pleadings to show that the respective trespasses of the parties related to, or depended upon, or in any way affected each other.

APPEAL from a judgment of the superior court of Del Norte county, entered in favor of the defendant. The opinion states the facts.

L. F. Cooper, for the appellant.

J. D. H. Chamberlain and *W. A. Hamilton*, for the respondent.

MCKEE, J. In an action commenced by the plaintiff against the defendant, in the court below, to recover damages for injuries to personal property, the defendant filed an answer which contained specific denials of the allegations of the complaint, and also a cross-complaint which contained six several causes of action against the plaintiff for distinct trespasses committed on the defendant's close.

To this cross-complaint the plaintiff demurred generally on the ground of ambiguity and uncertainty, and specially—1. That the statement of each cause of action was insufficient to constitute a cause of action; 2. That the act of the legislature cited in the statement of each count does not apply to inclosed lands; and 3. That a cross-complaint for damages for trespasses upon land is not maintainable in an action for injuries to personal property. The demurrer was overruled, and on this appeal that is the only error assigned.

The general demurrer merely pointed out that the cross-complaint contains six several counts which should have been condensed into one. But the several counts were laid for several distinct trespasses, and, even if that were not so, the number of counts contained in a complaint does not, of itself, constitute matter which renders the complaint ambiguous and uncertain, and challengeable by a general demurrer: Bernero v. Ins. Co., 3 West Coast Rep. 292. The particular matter constituting an ambiguity in a pleading should be pointed out by a special demurrer. If that is not done a general demurrer on that ground may be disregarded: Blanc v. Klumpke, 29 Cal. 157.

The statement of facts in each count of the cross-complaint was sufficient to constitute a cause of action. It showed actual possession by defendant at the commencement of the action of certain lands and premises "inclosed by a good and substantial inclosure;" unlawful entry thereon by the plaintiff with bands of sheep, with which he, against the consent of defendant, depastured the land to his great damage. The several trespasses, it is alleged, were committed "contrary to the provisions of an act of the legislature of the state of California, entitled 'An act to restrict the herding of sheep, approved May 18, 1861.'"

The last allegation did not affect the sufficiency of the statement of facts which constituted the cause of action of any of the counts so as to render them subject to a general demurrer. It may have been surplusage, or irrelevant and redundant, and as such it would have been the duty of the court to strike it out on motion, or the court could, no motion having been made for that purpose, disregard it in construing the pleadings; and that is what it seems the court did do, for judgment was not given or entered according to the terms of the statute. At all events, in the presence of a general demurrer, the cross-complaint was sufficient to entitle the defendant to relief on any or all of the several causes of action stated therein.

But the cross-complaint was not filed in a proper case. Section 442, Code Civ. Proc., provides: "Whenever the defendant seeks affirmative relief against any party, relating to or depending upon the . . . . . transaction upon which the action is brought, or affecting the property to which the action relates, he may, in addition to his answer, file at the same time . . . . a cross-complaint," etc.

The complaint in the action avers that on certain days, "at the county of Del Norte," the defendant chased and drove about with dogs certain sheep of the plaintiff, in consequence of which some of them died and the others were greatly damaged and materially injured to the plaintiff's damage. That was the *gravamen* of the action. There is no averment that these wrongs were done on the defendant's land. Nor is there in the cross-complaint any allegation that the sheep of the plaintiff, which were driven about and chased by the defendant's dogs, were found damage-feasant upon the defendant's land. *Non constat*, therefore, that the alleged trespasses, which constitute the *gravamen* of the causes of action stated in the defendant's cross-complaint, related

to or depended upon, or in any way affected the trespasses charged in the complaint in the action. For that reason the court erred in overruling the demurrer to the cross-complaint.

Judgment reversed and cause remanded for further proceedings.

Ross and MCKINSTRY, JJ., concurred.

DEMURRER ON ACCOUNT OF AMBIGUITY must specify defect; a general demurrer is insufficient: Owen v. Oviatt, 6 West Coast Rep. 239. As to the office of a general and special demurrer, see Tehama County v. Bryan, 8 Id. 222. A demurrer, to be available, must go to the whole cause of action or defense; it cannot be interposed to a part only: Reed v. Drais, 7 Id. 523; Herefort v. Cramer, 4 Id. 229; Locke v. Peters, 2 Id. 725. And a general demurrer to the entire complaint, in a portion of which a cause of action is stated, should be overruled: Fleming v. Albeck, 7 Id. 177; Clark v. Smith, 4 Id. 91.

COMPLAINT IN TRESPASS TO LAND—SUFFICIENCY OF ALLEGATIONS: See Faber v. Cathrin, 1 West Coast Rep. 871; Martin v. Jacobs, 2 Id. 135.

No. 8,784

MORTON *v.* BARTNING.

In Bank. Filed December 28, 1885.

STATUTE OF LIMITATIONS—PLEA OF—AMENDMENT SETTING UP.—The plea of the statute of limitations is not favored by the courts; and generally, where a party omits to plead the statute, and goes to trial without doing so, although the claim proved against him is clearly barred on its face, he will be deemed to have elected to stand upon the other defenses, and will not be permitted to amend by adding the plea.

THE SAME—WHEN AMENDMENT SHOULD BE ALLOWED.—But where a complaint to recover on an alleged written promise is, during the trial, amended so as to allege a verbal promise, the defendant has a right to amend his answer by setting up the statute of limitations. In such case his application to amend is not addressed to the discretion of the court. Such defense may then be pleaded to the plaintiff's entire cause of action.

APPEAL from an order of the superior court of the city and county of San Francisco granting the defendant a new trial. The opinion states the facts.

H. A. Powell, for the appellant.

James Wheeler, for the respondent.

BELCHER, C. C. This is an appeal by the plaintiff from an order granting the defendant a new trial.

The action was commenced to recover a balance due plaintiff for services rendered as physician and surgeon to the officers and employees of the Hormiguera Mining Company, a corporation, and which, as alleged in the original complaint, the defendant on or about the fifteenth day of October, 1878, for value received, agreed and promised in writing to pay.

The defendant by his answer denied that he ever agreed or promised in writing, or in any other manner, to pay the plaintiff's claim or any part thereof.

On the first day of the trial, and after the plaintiff had been upon the stand as a witness for some time, plaintiff's counsel asked and obtained leave, against the objections of defendant, to amend the complaint by inserting "and that by reason of a further promise by the defendant, verbally to the plaintiff, to answer for the said debt of said company to him, the plaintiff canceled the debt of said company to him, and accepted the defendant's promise as a substitute therefor."

At the opening of court on the second day of the trial, counsel for defendant asked leave to amend the answer by adding, "and for a further and separate answer to plaintiff's complaint the defendant alleges that the plaintiff's cause of action is barred by subdivision 1 of section 339 of the code of civil procedure."

Without objection on the part of the plaintiff, the court refused to allow the amendment on the ground that it came too late; and the defendant reserved an exception.

At the conclusion of the trial the court found, among other things: "That there was a written agreement on the part of the defendant to pay the debts of the Hormiguera Mining Company, and that in this written agreement there was a promise to pay said debt owing by said company to plaintiff. That defendant verbally promised plaintiff to pay said debt of said company to him, and in consideration thereof the plaintiff canceled the said debt of the said company to him. That said verbal promise was made upon consideration that the plaintiff should cancel said debt of the company, and that thereupon plaintiff did cancel said obligation of the company to him, and accepted the new promise of the defendant therefor."

The motion for new trial was made upon the ground that the evidence did not justify the decision, and of errors of law occurring at the trial, among which was specified the refusal to allow the amendment to the answer.

After granting the motion the court filed a written opinion, in which it is said: "The only error committed by the court on the trial herein, in my opinion, was in refusing to allow the defendant to file the plea of the statute of limitations on the trial. The defendant should have been permitted to plead the statute of limitations to the amendment to the complaint, alleging the verbal promise."

It is now claimed for the appellant that the court erred in granting the new trial, for the reason that the application to amend the answer was addressed to the discretion of the court, and the exercise of that discretion could not become or be assigned as an error in law.

There can be no question that the general rule is, as stated by counsel, that the plea of the statute of limitations is not favored by the courts, and where a party omits to plead the statute, and goes to trial without doing so, although the claim proved against him is clearly barred on its face, he will be deemed to have elected to stand upon the other defenses, and will not be permitted to amend by adding the plea: Wait's Pr. 65; Angell on Limitations, sec. 285.

But the rule invoked has no application in this case. Here the

plaintiff, during the trial, amended his complaint, and the defendant then had a right to amend his answer, and his application to be permitted to do so was not addressed to the discretion of the court.

Nor do we think the amendment was rightfully refused, as claimed for the appellant, because it was a plea to the "plaintiff's cause of action," and not to the alleged verbal promise alone. It was not refused for that reason, but because it came too late. The plaintiff's cause of action was a supposed right to recover from the defendant the amount of money claimed to be due him, and was rested upon an alleged written promise, and verbal promise to pay it. When, therefore, the plaintiff, by his amendment, gave the defendant the right to amend, we see no reason why he might not make his amendment as broad as he did make it.

It is not necessary to notice the other points made.

We think the order should be affirmed.

SEARLS, C., and FOOTE, C., concurred.

By the COURT. For the reasons given in the foregoing opinion the order is affirmed.

WEST COAST REPORTER.

WHOLE NO. 107. JANUARY 14, 1886 VOL. VIII. No. 11.

SUPREME COURT OF COLORADO.

SOUTH BOULDER DITCH ETC. CO. *v.* COMMUNITY DITCH ETC. CO.

Filed December 1, 1885.

APPEALS UNDER ACT OF 1885—TRANSCRIPT, WHAT TO CONTAIN—AUTHENTICATION OF.—In an appeal, in an action at law, taken under the act of 1885, the papers required to be embodied in the transcript, by section 9, are copies of the order or judgment appealed from or the part thereof mentioned in the notice, a copy of the notice of appeal, and a copy of the appeal bond if any be filed. The appellant may also order into the transcript other matters; but such extra matters will not be considered by the supreme court unless also included in the abstracts. The cost thereof will in no event be taxed to the appellee; nor will the attempt to incorporate the same be accepted as a ground for extending the time fixed by statute for filing the transcript. Such transcript should be certified by the clerk, under the seal of the court, in the same manner as transcripts in cases upon error.

APPEAL from the district court of Boulder county. The opinion states the facts.

B. L. Carr, for the appellant.

By COURT. This is an action at law, and the appeal is taken under the act adopted by the last general assembly regulating appeals to this court: Sess. Laws 1885, 350. Appellant now presents a motion for additional time within which to file the transcript required by statute. It is evident from the nature of this application that counsel is in doubt concerning the construction which should be placed upon section 9 of the act above mentioned.

Inasmuch as several similar applications have been made, and uncertainty seems to exist in the minds of the bar generally as to its meaning, we have deemed it advisable to here construe this provision. The difficulty alluded to exists in determining what is to be embraced in the transcript.

The section mentioned contains, *inter alia*, the following: "The clerk shall forthwith transmit to the clerk of the supreme court a transcript of the judgment or order appealed from, or so much thereof as is mentioned in the notice; the notice of appeal and the undertaking on appeal, if any, *and so much of the record in the case additional as the appellant in writing may direct.*"

Section 16 of the act reads as follows: "The cause shall be submitted to the supreme court upon the printed abstracts of record and amended abstracts as herein provided, and no transcript in writing shall be filed, and no costs shall be taxed therefor except as herein provided."

These provisions of the statute must be construed together; they must also be viewed in connection with all the other sections thereof, particularly those numbered 17, 18, 19, and 20.

Had the portion of the extract from section 9 which we have italicized been omitted, there could have arisen no doubts as to the legislative intent in the premises. But it is clear, we think, that in ordinary cases the only matters essential to the transcript are a copy of the order or judgment appealed from or the part thereof mentioned in the notice, a copy of the notice of appeal, and a copy of the appeal bond if any be filed.

As a general rule, all matters contained in a bill of exceptions or in the record proper, aside from the above-named, must be submitted to this court upon the printed abstract required by said sections 16 et seq.

But the law-makers saw fit to incorporate into section 9 the expression which tends to create the ambiguity complained of; and in obedience to a familiar rule of statutory construction it is our duty to give effect thereto, if any reasonable meaning can be deduced therefrom. We suggest that it may have occurred to the members of the legislature that occasionally some matter entered in the record proper, or some paper upon the files, such as written findings of law or fact, and the like, might be so closely connected with the judgment or order appealed from as that the same would be unintelligible without it. So they concluded, through an abundance of caution, to say that the appellant might order into the transcript matters other than those specifically mentioned.

As already remarked, however, the review of the case here is had upon the printed abstracts. Counsel may order into the transcript a copy of matters other than the notice of appeal, the undertaking on appeal, the judgment or order appealed from, and the additional record entry or paper above mentioned, but such extra matters will not be considered in this court unless also included in the abstract. The cost thereof will in no event be taxed to the appellee; nor will the attempt to incorporate the same be accepted as a ground for extending the time fixed by statute for filing the transcript.

The statute does not expressly declare that the transcript under consideration shall be authenticated in any particular way. But we are of opinion that it should be duly certified by the clerk under the seal of the court, in the same manner as are transcripts lodged here in cases upon error.

A large part of the act in question is taken from the statutes of Iowa and Wisconsin. But the language of section 9 is unlike that contained in the corresponding provisions of those states. So far as we are advised, it is not copied from any legislation elsewhere in the Union. We have therefore been unable to examine or cite cases giving a construction thereof.

Under the circumstances, we have concluded to grant the motion and allow appellant in this case ten days additional time within which to file his transcript.

DARROW *v.* PEOPLE EX REL NORRIS.

Filed December 4, 1885.

CITY CHARTER OF DENVER—AMENDMENTS OF—SPECIAL LEGISLATION.—The law specifically relating to the city of Denver is not obnoxious to constitutional inhibitions against local or special legislation; and inasmuch as prior to and at the time of the adoption of the state constitution the entire city government was regulated by special charter, and as its citizens have not elected to abandon such charter and incorporate under the general laws, the charter remains in force; and a legislative revision or amendment thereof will not be reviewed for the purpose of determining whether or not the changes incorporated could be made by special legislation.

THE SAME—CITY COUNCIL HAS POWER TO JUDGE OF QUALIFICATION AND ELECTION OF MEMBERS.—The provision of the charter of the city of Denver, as amended by the acts of 1881, 1883, and 1885, that "the city council shall be the sole judge of the qualifications, elections, and returns of its members," etc., is not obnoxious to section 12, article 7, of the constitution, requiring the general assembly, by general laws, to designate the courts and judges by whom election contests shall be tried.

PETITION for a rehearing. The prior opinion is reported *ante*, page 267.

Charles W. McCord, for the appellant.

F. W. Hankey, for the appellees.

HELM, J. In passing upon this application, we deem it necessary to say a few words with reference to one of the questions argued by counsel.

Our attention is invited to section 12, article 7, of the constitution, which provides that "the general assembly shall, by general law, designate the courts and judges by whom the several classes of election contests, not herein provided for, shall be tried, and regulate the manner of trial, and all matters incident thereto; but no such law shall apply to any contest arising out of an election held before its passage."

It is now claimed that section 3, article 11, of the charter of the city of Denver—which we have regarded as depriving the courts of their jurisdiction to inquire into qualifications for membership in the city council—being a local law, is in conflict with the constitutional provision above cited, and therefore void.

By examining the cases of Brown v. City, 7 Col. 305, 2 West Coast Rep. 618, and Carpenter v. Tilford, 5 West Coast Rep. 553, counsel will see that this court has twice expressly declared that the law specifically relating to the city of Denver is not obnoxious to constitutional inhibitions against local or special legislation; that inasmuch as prior to and at the time of the adoption of the state constitution, the entire city government was regulated by special charter, and inasmuch as its citizens have not elected to abandon such charter and incorporate under the general law, the charter remains in force; and a legislative revision or amendment thereof will not be reviewed by this court for the purpose of determining whether or not the changes incorporated could be made by general law.

The amended charter of Denver, adopted by the legislature in 1874, contains the following provision: "The city council shall judge of the

qualifications, elections, and returns of their own members, and shall determine all contested elections under this act:" Sess. Laws 1874, p. 268, sec. 5.

This provision was retained *verbatim* in the revision of the charter by the legislature of 1881.

It was re-enacted, and is contained in the revision made in 1883.

The legislature of 1885, at the regular biennial revision of the charter, saw fit to incorporate this provision substantially as theretofore written, except as modified by the insertion of the word "sole."

Thus it appears that legislature simply amended a section of the charter which existed prior to the adoption of the constitution, and had been repeatedly readopted since that instrument became the supreme law of the state. Under the view taken by this court in the cases above cited such amendment was a subject concerning which the courts will not inquire into the legislative conduct.

The suggestion is not out of place that we have here additional corroboration of the position taken in our prior opinion on the subject of legislative intent. For, as the provision stood previous to 1885, while the power of the city council existed to investigate the questions named, yet the power was not exclusive. It was simply concurrent with the jurisdiction of the courts over the subject of prior disqualification by *quo warranto*. The fact that the last legislature saw fit to incorporate the word "sole" into the act is, under an established principle of statutory construction, to be taken as evidence that a change was intended; but the only change which reasonably suggests itself to a rational mind is that they thereby expressly declared their will to render the jurisdiction of the council, theretofore concurrent, thereafter exclusive.

In the constitutional provision now relied on, we discover no reason for changing the views already expressed. The legislature retains the privilege of enacting such local or special laws with reference to the city of Denver as shall be deemed in their judgment advisable; provided, of course, the same may be fairly considered as revisory or amendatory of the charter existing prior to the adoption of the constitution.

Counsel very clearly and cogently urge the dangers arising from lodging the power in question exclusively with the city council of Denver or the separate branches of that body. They suppose the perpetration of a number of high-handed outrages upon the people by the council through this extraordinary jurisdiction, and urge with great force the necessity that the courts should come to the rescue.

Their appeal must be addressed to the legislature. But it may be remarked that, in the first place, the law does not presume that persons elected to public office will betray the trust imposed and prove recreant to the oath taken; and secondly, that if they do, in cases like the one at bar, the people have two methods of redress: they may rectify the evil at the succeeding election for councilmen by selecting good and true men to fill the office, and they may also invoke legislative aid in the premises.

A municipal corporation is the creature of the legislative will. Legislatures possess, and continually exercise, the right of conferring upon such corporations all privileges, powers, and duties essential to the efficient accomplishment of the purposes for which they are called into being. And unless the statutory expression in this respect can be clearly construed as inconsistent with some constitutional inhibition or requirement it will not be questioned. But, in the case at bar, it is apparent that the legislative action cannot be challenged upon this ground under any of the constitutional provisions cited.

And if we were to disregard the legislative intent as unequivocally declared in the statute, we would be guilty of establishing a precedent more dangerous than are the possible evils that might be averted.

The rehearing is denied.

SMITH v. PEOPLE.

Filed December 4, 1885.

ABSENCE OF THE DEFENDANT FROM THE COURT, when the jury returned a verdict of conviction, vitiates the verdict.

NEW TRIAL—GROSS MISCONDUCT OF DISTRICT ATTORNEY—CHARGING DEFENDANT WITH OTHER OFFENSES.—Gross misconduct of the district attorney, in charging the defendant, in his closing argument to the jury, with having been guilty of several murders, of which no evidence had been given, will be deemed prejudicial, and warrant a new trial. And this, although prior to the commencement of such argument the court cautioned the jury not to consider statements of counsel not supported by the evidence.

ERROR to the criminal court of Lake county. The opinion states the facts.

Taylor & Ashton, and *E. T. Taylor*, for the plaintiff in error.

T. H. Thomas, attorney-general, for the defendant in error.

BECK, C. J. The plaintiff in error was tried and convicted of the criminal offense of receiving stolen property, knowing it to have been stolen, at the December term, 1884, of the criminal court of Lake county.

The jury stated in their verdict that the property so received by the defendant was of the value of fifty dollars.

A motion for a new trial was overruled, and thereupon the court sentenced the prisoner to confinement in the penitentiary for a term of three years.

One of the errors assigned is that the prisoner was not present when the jury returned this verdict of guilty. It is a general rule of law that the prisoner, in cases of felony, must be present at every step in the proceedings, or the proceedings will be invalid.

So important is this right that, except in cases of misdemeanor, it cannot be waived by counsel. If the prisoner is deprived of the privilege of being present when the verdict is returned the verdict must be set aside, and a new trial granted, or the judgment will be reversed: Green v. People, 3 Col. 68; 3 Whart. Crim. L., secs. 2991, 3364.

Exceptions are made as to the necessity for the continued presence of the prisoner throughout the entire trial, which include voluntary absence from the court-room for a few moments, also such violent conduct on the part of defendant as to render it necessary to remove him in order that the trial may proceed. Where absence occurs from such causes it is said to be no ground of error, provided the prisoner is brought into court before the verdict is formally announced: 3 Whart. Crim. L., sec. 3365.

Another error assigned, and one which we regard as fatal to the judgment below, was the refusal of the court to grant the defendant's motion for a new trial, based on the ground of certain misconduct of the acting district attorney, which was prejudicial to the rights of the defendant.

The record shows that the special district attorney who had been appointed by the court to appear and prosecute this case on behalf of the people, in his closing address to the jury, "stated and argued to the jury that he had stated in the opening of this case that he expected to prove that the defendant had stated, 'as Mollie Gorman was dead, she did not fear a conviction,'" but the court had prevented him from so doing, to which statement so made by said attorney the defendant then and there duly excepted, and protested against counsel making any other or further statements of like import, and that the judge cautioned said attorney from making any further comments of like import, and further stated to the jury that they should disregard such statement.

Thereupon said attorney further stated that he had further expected to prove, as stated in his opening, that the defendant had murdered Mollie Gorman; to which statement, so made by said attorney, the defendant then and there duly excepted.

Said attorney further stated, in his closing address to the jury, that "the defendant forgot to explain to the jury that the reason she gave Casserleigh the sum of twenty-five dollars was that she expected the enraged miners to blow up her house on account of the murder of Bulkley, to which statement, so made by the said attorney, the defendant then and there duly excepted."

The action of the prosecuting official, as above set forth in the record, constitutes gross misconduct on his part and a total disregard of the legal rights of the prisoner. It manifests a disposition to ignore the plainest principles of law in relation to the trial of criminal offenses, and exhibits contempt for the authority and dignity of the court, of which he was then an officer.

Such statements, coming from the acting district attorney at the time and in the manner made must have been highly prejudicial to the cause of the defendant. They were not only made by an officer of the court, but they were made in the closing or last speech to the jury, when there was no opportunity for defendant's counsel to criticise or answer them.

No such facts had been received in evidence, and they were not only wholly outside the evidence, but totally irrelevant to the subject-matter of the trial.

The officer could have had but one motive in view in the course pursued by him, viz., to prejudice the jury against the prisoner, by charging her with the commission of graver crimes than the offense for which she was being tried.

Failing to get before the jury such irrelevant testimony, he determined, if possible, to poison the minds of the jury against the prisoner by openly charging her, upon his own authority, with the murder of the two persons named.

In so doing he defied the authority of the court, violated the law, and abused his privilege as a public prosecutor.

The law of the land guarantees to every one accused of crime, whether of high or low degree, whether rich or poor, a fair and impartial trial.

Certainly it cannot be said, in view of the facts and circumstances above set out, that the defendant in this case received a fair and impartial trial within the letter and spirit of the constitution and the laws of this state, unless it can be said that the errors appearing in the record were cured, so that the defendant was not prejudiced thereby: Scripps v. Reilly, 35 Mich. 371; Tucker v. Henniker, 41 N. H. 317.

The judge seems to have anticipated the conduct of this officer, and the means to which he would resort to secure a conviction, as he appears to have instructed the jury before the oral arguments to the effect that if said officer should make statements charging that the prisoner was of bad reputation it would be highly improper and wrong for the jury to give them any weight whatever.

This instruction, however creditable to the court, did not cure the error, since it was given before the arguments, and when the officer commenced his attack upon the character of the defendant the judge failed to suppress the same.

The attorney appears to have continued, after the court's effort to restrain him, and to complete all the charges he desired to make, without further opposition, save by the objections of the defendant.

The criticism on the action of the court is, that the judge failed to assert and maintain the authority and dignity of the court, by reason whereof a prisoner upon trial was prejudiced.

The law places at the command of all judicial tribunals ample power and means to enforce obedience to their lawful orders in such cases, by the way of fines and, if necessary, imprisonment.

It is the duty of courts to require their proceedings to be conducted according to the rules of law, and to protect the rights of litigants.

That the proceedings in this instance were defective in the essentials mentioned, is fully shown by the record.

We are further of opinion that the errors complained of were not cured, for which reasons the judgment must be reversed, and the cause remanded.

Reversed.

Attorney-General Theodore H. Thomas being of opinion, from an inspection of the record, that the prisoner was not awarded a fair and impartial trial, declined to prosecute the case.

ACCUSED, WHEN MUST BE PERSONALLY PRESENT AT TRIAL: See Sperry v. Commonwealth, 33 Am. Dec. 261; Fight v. State, 28 Id. 626, and note; Sneed v. State, 41 Id. 102, and note; State v. Hughes, 36 Id. 411. Receiving a verdict in the absence of counsel for the defendant, if he is summoned and does not appear within a reasonable time, is not error: People v. Bennett, 2 West Coast Rep. 905. Presence of prisoner at sentence, when essential: Hamilton v. Commonwealth, 55 Am. Dec. 485.

MISCONDUCT OF DISTRICT ATTORNEY, WHEN GROUND FOR NEW TRIAL: See People v. Wheeler, 2 West Coast Rep. 70.

MINICH *v.* PEOPLE.

Filed December 4, 1885.

CRIMINAL LAW—ARRAIGNMENT—FAILURE TO READ INDICTMENT TO PRISONER.—The provision of the statute requiring the defendant, in a criminal prosecution, to be furnished with a copy of the indictment, is a better means of informing him of the nature of the charge, than reading the indictment to him. Consequently where such copy is furnished the failure to read it to him on his arraignment is not a fatal defect. And this, although such copy was furnished but a few moments before he was called upon to plead, if he made no objection and made no protest to a statement of his counsel that "we have read the indictment and know its contents."

THE SAME—FAILURE TO FURNISH DEFENDANT WITH LIST OF WITNESSES.—The failure to furnish a defendant charged with murder with a list of all the witnesses called by the prosecution, prior to the arraignment, is not a fatal error, if prior to the trial he is furnished with the names of all witnesses called in chief, and there is no showing that he was in any way surprised, or his rights prejudiced by reason of the fact that he was not sooner apprised that they would be sworn.

THE SAME—FAILURE TO FURNISH DEFENDANT WITH LIST OF PETIT JURORS.—The failure to furnish a defendant with a list of the petit jurors prior to his arraignment, unless it appears that he was prejudiced thereby, will not warrant setting aside a conviction when such list was furnished him prior to his trial, and no objection was made upon this ground, either to the arraignment or to impaneling the jury and going to trial.

THE SAME—CHALLENGE FOR CAUSE—PEREMPTORY CHALLENGE.—Admitting that the finding of the trial court upon a challenge of a juror for cause is reviewable, an erroneous denial of such challenge will not warrant a reversal if the juror was afterwards peremptorily challenged by the defendant, who subsequently went to trial without having exhausted all the peremptory challenges to which he was entitled.

THE SAME—BIAS OF JUROR—CHALLENGE FOR CAUSE.—A challenge for cause interposed by the prosecution is properly allowed if the juror testifies on his *voir dire* examination that he had formed and expressed a positive opinion concerning the defendant's guilt or innocence; that such opinion was obtained from statements made to him by witnesses; that he had business relations with a co-defendant of the prisoner; and that he supposed himself to entertain a feeling of "bias at the outset."

OATH OF JURY—DULY SWORN, WHAT IMPLIES.—A recital in the record that the jury were duly sworn implies that the oath was administered with the requisite formality and solemnity; that the jurors in open court were required to hold up their hands and promise to perform the duties specified; and that there was an appropriate reference to the Deity, such as "in the presence of the everliving God," or "so help me God."

THE SAME—FORM OF OATH—SUFFICIENCY OF.—It is sufficient if the jury is sworn to "well and truly try the issue joined, and a true deliverance make between the people and the prisoner at the bar, and a true verdict render according to the law and the evidence." The expression "whom you shall have in charge" is not material, and its omission does not vitiate the oath.

INSTRUCTION ON THE LAW AS TO ACCESSARIES BEFORE THE FACT held to be supported by the evidence.

WITNESS FALSE IN PART—JURY MAY DISREGARD.—The jury, if they believe that any witness has willfully testified falsely to any material point in the case, are at liberty to disregard the entire testimony of such witness.

DEFENDANT WITNESS IN HIS OWN BEHALF—WEIGHT OF TESTIMONY.—Where a defendant is a witness in his own behalf, the court may instruct the jury to consider all the

circumstances under which his testimony is given, including his particular personal interest in the result of the trial.

REASONABLE DOUBT DEFINED.—The reasonable doubt which will warrant a jury in returning a verdict of acquittal means a serious, substantial, and well-founded doubt, and not a mere possibility of a doubt. It is such a doubt as in the important transactions of life would cause a reasonable and prudent man to hesitate and pause.

MURDER—CIRCUMSTANTIAL EVIDENCE—WHEN JURY SHOULD ACQUIT.—In a prosecution for murder, where the evidence of the defendant's guilt is entirely circumstantial, the jury should acquit if there is any other reasonable theory or hypothesis upon which the killing may be accounted for. An unreasonable or imaginary hypothesis, though it be supposed to arise from the evidence, will not justify a verdict of not guilty.

REFUSAL TO GIVE INSTRUCTION REQUESTED is not error if it has already been given in substance.

EVIDENCE REVIEWED, AND ALTHOUGH CIRCUMSTANTIAL, held to sustain the verdict of conviction.

ERROR to the district court of Lake county. The opinion states the facts.

M. L. Rice, Philip O. Farrell, and *Taylor & Ashton,* for the plaintiff in error.

T. H. Thomas, attorney-general, for the defendant in error.

HELM, J. Indictment for murder; cause tried in January last; plaintiff in error convicted of murder in the first degree and sentenced to death. By means of a *supersedeas* from this court execution stayed until such time as the trial could be reviewed upon the record before us.

Thirty-four errors are assigned, fifteen of which are argued at length by counsel. We will now proceed to consider those sufficiently important or material to require notice.

1. It is urged that accused was not arraigned and given an opportunity to plead before trial. If this assignment of error is correct, the judgment must of course be reversed; because the arraignment and plea constitute the issue to be tried. And consequently if there was no arraignment and plea there is nothing upon which a trial could be had.

The record proper contains the following entry: "Now on this day comes William Kellogg, who prosecutes the plea of the people in this behalf, and comes defendant herein, Si Minich, in his own proper person, and by M. L. Rice, esq., his attorney, and thereupon said defendant being brought before the bar of the court and arraigned, and the indictment herein being read to him, and he being furnished with a copy of the same, and a list of the jurors and witnesses, and required to plead to said indictment, whereupon he answers and says he is not guilty in the manner and form as charged in said indictment, and of this he puts himself upon the country for trial, as does the district attorney."

The facts attending this proceeding, as disclosed by affidavits in support of a motion to correct the record, are as follows: Plaintiff in error being brought into court accompanied by his attorney, and having received a copy of the indictment after some little time, the exact length of which we are not advised, was called upon by the district

attorney to plead; thereupon he arose in presence of the court, and the district attorney began to read the indictment; when he had read a few words Mr. Rice, counsel for the accused, interrupted with the statement, substantially, "You need not read the indictment; we have read it and know its contents; the record may show a formal arraignment and plea of not guilty;" whereupon the district attorney desisted from further reading of the indictment, and demanded of the accused whether he was guilty or not guilty; to which inquiry either he or his counsel responded "not guilty," and the court directed such response to be entered of record. We think the weight of proofs in the affidavits sustains the conclusion that it was the accused himself who entered the plea.

Some of the ancient formalities connected with the arraignment of persons accused of crime have long been discarded. And now there seem to be in practice three acts attending the proceeding, viz.: Calling the defendant to the bar of the court to answer the matter charged against him, reading the indictment to him, and demanding of him whether he is guilty or not guilty. By statute in this state—section 954 of the general statutes—it is expressly enacted that the declaration of his plea may be made orally, by himself or by counsel. Also that the mention of the arraignment and such plea in the records of the court shall constitute the issue between the people of the state and the prisoner.

It will be observed from the foregoing that the question whether the response of "not guilty" was given by the accused or his attorney is of no importance. And upon examination of the facts above stated it will be seen that the arraignment in this case complied fully with the requirements mentioned, except in one particular, *i. e.*, the reading of the indictment. Is this a fatal defect?

It is almost superfluous for us to say that the object to be attained by this step in the proceeding is to inform the prisoner of the exact character of the crime with which he stands charged, and for which he is to be tried. At common law the material importance of this proceeding is unquestioned; for it was the only means through which the accused was given by the state a complete description of the offense charged. Section 953 of the general statutes now, however, expressly provides that before arraignment the prisoner shall be furnished with a copy of the indictment. There can be but one object in the enactment of this provision; and that is to accomplish the very purpose for which the reading of the indictment originally took place. It needs no argument to show that in this respect the latter method is better than the former; that with a copy of the indictment in his possession to be read and re-read by himself, and by his counsel, he is more thoroughly advised of the crime charged than he could possibly be in listening to the oral reading thereof by the district attorney; the latter officer might by mistake, or through design, omit to read, or misread, material matters therein contained; but when the accused has an exact copy for his own inspection and that of his attorney, no such mistake or impo-

sition is possible. Thus we see that not only is the statutory provision framed for the purpose of accomplishing the very object designed in the reading, but that it is a decided improvement, as far as the accused is concerned, in this regard. In Illinois, under statutes similar to ours, it is declared that "the statutory requirement of furnishing the prisoner with a copy of the indictment is a better means of information to him of the charge than the reading of the indictment to him:" Fitzpatrick v. People, 98 Ill. 259. And it is substantially held that the reading of the indictment is not essential.

In the case of Goodin v. State, 16 Ohio St. 344, the accused had been furnished with a copy of the indictment at a period prior to his arraignment; upon his arraignment the indictment was not read to him, but he entered his plea of not guilty without objection, and the court say: "It would have been then an idle ceremony to read him a paper with the contents of which he was already familiar. The prisoner stood in court better informed of the character and nature of the charges preferred in the indictment than he could have been by any hasty reading thereof in court under the embarrassments incident to that situation:" See 1 Bish. Crim. Proc., 2d ed., sec. 733.

There are cases which hold that even in indictments for a felony, if the accused, anterior to trial, pleads not guilty, and the plea is accepted and recorded, the entire omission of an arraignment is cured on the ground of waiver.

But we do not in this connection pass upon the question of waiver, except as to the reading of the indictment. We hold that since the reason for this proceeding is fully satisfied, the irregularity, if such it can be termed, is not fatal to the judgment.

Counsel complain that the accused in this case could not have been sufficiently informed of the contents of the indictment at the time he pleaded thereto, because, as they say in argument, a copy thereof had only been delivered about five minutes previous. This suggestion comes too late. Had the announcement been made when he was called upon to plead to the indictment, the arraignment would have been postponed; and from the fact that he stood by and made no objection or protest when his counsel declared "we have read the indictment and know its contents," we must presume that the statement was true.

2. It is assigned as error that a list of all the witnesses who testified in chief upon the trial was not furnished to the accused previous to his arraignment, as required by section 953, aforesaid, which reads: "Every person charged with murder or other felonious crime shall be furnished, previous to his arraignment, with a copy of the indictment and a list of the jurors and witnesses." It appears that the names of all witnesses who testified before the grand jury were indorsed upon the indictment, a copy of which instrument with such indorsement was delivered to the accused. It also appears that before going to trial a list of all other witnesses used in chief by the state was given him. And it further appears that no objection was interposed to wit-

nesses testifying on the ground that their names were not furnished the accused prior to arraignment.

Under our practice, the foreman always indorses upon the indictment the names of all witnesses examined by the grand jury. In Illinois, where the practice is similar but statutory, it is held that the list of witnesses commanded by the statute to be furnished the prisoner prior to his arraignment is to embrace those which were to be indorsed upon the indictment. And it is further held that the prosecution is not confined to the list of witnesses thus furnished prior to arraignment; "that the circuit court in the exercise of a sound discretion, and having a strict and impartial regard for the rights of the community and the prisoner, may permit such other witnesses to be examined as the justice of the case may seem to require:" Gardner v. People, 3 Scam. 83; Gates v. People, 14 Ill. 433; Logg v. People, 92 Id. 598, and cases cited.

Accepting the view taken in these cases and applying it to the case at bar, we must overrule this objection. Plaintiff in error was, as already stated, prior to the trial furnished with the names of all witnesses called in chief; and there is nothing in the record which shows that he was in any way surprised or his rights prejudiced by reason of the fact that he was not sooner apprised that they would be sworn: See Wilson v. People, 3 Col. 325.

3. A third objection to the judgment below is that the accused was not furnished with a list of the petit jurors prior to his arraignment. Although the record recites that this provision of section 953, aforesaid, was complied with, yet the facts appear to be as follows: That at the time of arraignment the entire panel of jurors had been excused for the term and no special *venire* had been returned; it was therefore impossible to then arraign the defendant and also furnish the list of jurors; it further appears that before trial a list of the jurors summoned was delivered to defendant and consulted by his counsel in selecting the jury; also that no objection whatever was interposed upon this ground, either to the arraignment or to impaneling the jury and going to trial.

With reference to the statutory requirement aforesaid concerning jurors this court has held that it relates to an important right. "It gives the prisoner and his counsel an opportunity to inquire concerning and consider upon the character, dispositions, and relations of those composing the regular panel, and to select such as they think will give the prisoner a fair and impartial trial:" Stratton v. People, 5 Col. 276; Mooney v. People, 7 Id. 218. But in both of these cases the question discussed and decided had reference solely to the improper depletion of the regular panel by the sustaining of challenges for cause upon insufficient grounds. And the proposition now urged was not there presented.

It would seem that since, in this case, the list of jurors was furnished prior to trial, and the defendant was thus given an opportunity to secure the requisite information concerning them, the reason of the law was complied with. If it appeared that the defendant was injured or

put to a disadvantage by the failure to furnish this list prior to arraignment, particularly if he entered a timely protest, his conviction ought not to stand. But there is nothing in this record from which the slightest prejudice to his rights on this account can be inferred.

Commenting upon this subject, the supreme court of Illinois say that while it is the duty of courts to prisoners "among other things, to notify them in due time, as to what men constitute the panel out of which the jurors for their trial should be called. . . . . It is not, however, every little inaccuracy which may occur in this regard for which a trial should be set aside:" Goodhue v. State, 94 Ill. 37.

And they hold under just such a statute as ours that unless the accused has been "put to a disadvantage" from the irregularity, his conviction out not to be set aside.

In Ohio a statute requiring that a list of jurors be furnished in capital cases "at least twelve hours before the trial" is construed to be simply directory as to a duty to be performed by the state; it is said that "if a defendant in a criminal prosecution wishes to avail himself of such omission of duty on the part of the state he must do it on motion before trial, or interpose it as an objection to being put on his trial." The doctrine that a waiver of this right may take place is fully recognized: Fouts v. State, 8 Ohio St. 98. On the subject of waiver as to this matter, see Pressley v. State, 19 Ga. 192; Russell v. State, 33 La. Ann. 135.

Mr. Bishop supports, with a strong array of authorities, the proposition that "if, while the petit jury is being impaneled, the prisoner knows of a cause of challenge against one of them or the whole, but declines to interfere then, he cannot afterwards bring forward the objection:" 1 Bish. Crim. L., sec. 997, and cases cited. Yet the reason for recognizing the doctrine of waiver in connection with such questions is not so strong as it is in the matter now before us.

The objection under consideration does not, in our judgment, justify reversal.

4. During the selection of the jury Flucken, one of the jurors called, was challenged by the defendant for cause. The examination upon his *voir dire* discloses such a state of mind on his part as would have justified the court in sustaining the challenge. He had formed a decided opinion upon the merits, and in his testimony several times declared that he would be influenced by the opinion, and could not fairly and impartially try the case. There is little doubt but that this juror, like many other business men, was anxious to avoid the performance of his duty in the premises. And there is strong justification, in his answers to the questions propounded, for the indignation aroused in the mind of the judge. But considering his testimony alone, as we find it in the record, it falls short of indicating that he would have acted as an impartial juror. This court has held that section 1893 of the general statutes transforms the character of the objection mentioned from a ground of principal challenge, as at common law, to a ground of challenge to the favor, and that by virtue of the statute the finding

by the court of the fact of the juror's indifference is not reviewable: Solander v. People, 2 Col. 48; Jones v. People, Id. 351.

It is unnecessary for us now to determine whether or not the position taken in these cases is affected by subsequent decisions, or by other legislation. For admitting that the finding upon this question is reviewable, and that the court in this case erred in denying defendant's challenge, we are still of opinion that the error, under the circumstances disclosed, does not authorize a reversal.

It appears that Flucken was challenged by the accused peremptorily, and consequently his previous opinion could in no way have influenced the verdict. It also appears that when the accused accepted the jury and went to trial he had exhausted but eight of his fifteen peremptory challenges. In view of these facts, we are constrained to hold that the error in denying the challenge for cause, if such it was, could not have injured accused; and therefore, being error without prejudice, it cannot be fatal to the judgment.

Upon this subject the cases are not all in accord; but the decided weight of authority is in favor of the view adopted. We have not given, and shall not attempt to give, the reasoning at length upon which our conclusion is based. We accept the conclusion, and content ourselves by referring counsel for the reasoning to some of the authorities in which the doctrine is maintained: Proffatt on Jury Trial, sec. 165; Erwin v. State, 29 Ohio St. 186; State v. Elliott, 45 Iowa, 486; State v. Lawler, 28 Minn. 216; State v. Davis, 41 Iowa, 311; Lum v. State, 11 Tex. App. 483; McGowan v. State, 9 Yerg. 184; Stewart v. State, 13 Ark. 720; Benton v. State, 30 Id. 328; Mimms v. State, 16 Ohio St. 221; Wilson v. People, 94 Ill. 299.

5. There was no error in allowing the challenge to the juror Priddy. His *voir dire* examination showed that he had formed and expressed a positive opinion concerning defendant's guilt cr innocence; that such opinion was obtained largely from statements made to him by witnesses; that he had business relations with Gillespie, who was jointly indicted and a codefendant with Minich, but who was not on trial, owing to a severance allowed by the court; and that he supposed himself to entertain a feeling of "bias at the outset." Upon these facts we think the challenge by the district attorney was wisely sustained.

6. Another objection presented is that the jury were not legally sworn to try the cause.

The record entry, which contains all the information before us on the subject, after naming the jurors, reads as follows: "Twelve good and lawful men of the county of Lake, who were duly impaneled, tried, and sworn to well and truly try the issue joined, and a true deliverance make between the people of the state of Colorado and Si Minich, the prisoner at the bar, and a true verdict render according to the law and the evidence." There is with us no statutory form for this oath, and it should be substantially as required at common law. The defects pointed out by counsel are the omission of the

clause, "whom you shall have in charge," and the concluding phrase, or invocation, "so help you God."

Had the record simply contained the declaration that the jury were "duly sworn," or that they were "sworn according to law," it would have been sufficient; but while conceding this, a number of the decisions hold that where an attempt is made to set out the oath administered, it must affirmatively appear that no material part was omitted.

It will be noticed that the record before us does not purport to give the exact oath administered to the jury; it is in narrative or historical form; it recites the fact that they were duly sworn, and then proceeds to indicate generally what they were sworn to do. The declaration that they were duly sworn implies that the oath was administered with the requisite formality and solemnity; that the jurors in open court were required to hold up their hands and promise to perform the duties specified; there being an appropriate reference to the Deity; such as "in the presence of the everliving God," or "so help me God:" See Wareham v. State, 25 Ohio St. 601; Bartlett v. State, 28 Id. 669; Kerr v. State, 36 Id. 614.

This disposes of counsel's objection in so far as it relates to leaving out the invocation in question.

Since, however, the record attempts to specify the duties which the jury in this case were sworn to perform, we are inclined to think there should, as to such duties, be no material omission. But no objection can be maintained upon this ground. The jury were sworn to "well and truly try the issue joined, and a true deliverance make between the people of the state of Colorado and Si Minich, the prisoner at the bar, and a true verdict render according to the law and the evidence." The expression "whom you shall have in charge" is in no sense material; it adds nothing in explanation of their duties, nor does it in any way enhance the solemnity of the oath; its omission, therefore, does not vitiate the proceeding.

In most of the cases cited by counsel for plaintiff in error the defects held fatal consisted in omitting important matters pertaining to the duties of jurors.

7. It is claimed that the eighth instruction given declaring the law as to accessaries before the fact was authorized by no evidence in the record, and may have misled the jury.

But little proof is required to support an instruction.

The conviction in this case rests entirely upon circumstantial evidence. It appeared from examination of the ground where the body of deceased was found, that a struggle had taken place; that probably two or more persons were engaged in the killing; the fatal shot must of course have been fired by one of them. And supposing Minich to have been one of these persons, it might be impossible to know beyond a reasonable doubt whether he himself or a confederate did the shooting. But under the statute, whether he did or not was a matter of no importance. He was charged in the indictment both as principal and

as accessary before the fact. If he was an accessary before the fact, he was equally guilty of the crime of murder.

The circumstances shown fully warranted the charge.

8. The court also instructed the jury as follows: "You are the sole judges of the credibility of the witnesses who have testified in this case, and if you believe that any witness in the case has willfully testified falsely to any material point in the case, you are at liberty to disregard the entire testimony of such witness."

We are told that this instruction is wrong because it did not contain a qualification concerning corroborating testimony. It is said that if a witness willfully testifies falsely to a material fact, but his testimony as to other material matters is supported by corroborating proofs or circumstances, the jury should be told that they need not discard it in so far as it relates to such other matters. This position would perhaps be correct, should a court assume the doubtful authority of directing the jury that they must disregard the entire evidence of a witness willfully testifying falsely to one material fact; but it is not correct in cases like the present, where the court simply suggests that the jury may disregard, or that they are at liberty to disregard the testimony of such witness.

In Hamilton v. People, 29 Mich. 173, the court say: "While the jury cannot be compelled to disregard all the testimony of a witness who has willfully falsified, yet they may do so if they do not trust it."

In State v. Dwyer, 25 Mo. the judge who writes the opinion uses this language: "In my opinion, if the jury believe that a witness has willfully testified falsely in respect to a material fact, it is their duty to disregard the whole of his testimony and they should be so instructed by the court, but the other members of the court think that the jury ought only to be told that they may do what I think they are bound to do:" Paulette v. Brown, 40 Id. 52; People v. Sprague, 53 Cal. 491; Day & Co. v. Crawford, 13 Ga. 508.

9. The thirteenth instruction contained in the charge reads as follows: "The defendant in this case is a competent witness in his own behalf, and you are the sole judges of his credibility, and in determining such credibility you are at liberty to take into consideration any interest that the testimony may show such witness to have in the result of this case, if any is shown; any motive that the testimony may show him to have to induce him to testify falsely, if any is shown; his manner on the witness-stand; the probability or improbability of his statements; the consistency or inconsistency of his statements, one with the other; and, in fact, all the circumstances proved in the case that may enlighten you as to whether such witness is telling the truth or not."

It is claimed that this part of the charge is error, for the reason that it improperly singles out the testimony of the defendant, and directs the attention of the jury thereto. There can be no doubt as to the impropriety of the court's selecting and giving undue prominence to certain facts, or commenting thereon to the exclusion of certain other

and important parts of the testimony; indeed, under our practice, his province is to state the law, and omit all comment upon the evidence. But we know of no rule which prohibits the court's mentioning, in an appropriate way, a particular witness or class of witnesses. Our statute, speaking with reference to the testimony of a person on trial for crime, says that his interest, by reason of this fact, "may be shown for the purpose of affecting his credibility." In weighing the testimony of such person, and passing upon its credibilty, the jury have an undoubted right to consider all the circumstances under which it is given, including his particular personal interest in the result of the trial; and it is not error for the court to remind them of the latter circumstance, provided, as in this instance, he refrains from intimating or suggesting the degree of weight to be given it: See Bullinger v. People, 95 Ill. 394; People v. Morrow, 60 Cal. 142.

10. The fourteenth instruction allowed says to the jury: "You are further instructed that while you are not to find the defendant guilty, if you entertain a reasonable doubt of his guilt, you are not to search for a doubt. The doubt referred to must be such a doubt as would naturally arise in the mind of a reasonable man upon review of all the evidence in the case. It means a serious, substantial, and well-founded doubt, and not a mere possibility of a doubt. *It is such a doubt as in the important transactions of life would cause a reasonable and prudent man to hesitate and pause,* and when you can say after considering all the evidence in the case that you have an abiding conviction of the truth of the charge, then you are the more satisfied beyond a reasonable doubt."

Considering this instruction as a whole, we discover nothing objectionable therein. Counsel argue that the portion thereof which we have italicized was misleading to the jury; that from it they were given to understand that if, in the important transactions of life, a reasonable man would act, then the doubt spoken of in the instruction would not exist. If their interpretation were correct, the objection would be much more difficult to answer; because a reasonable and prudent man often acts in connection with the most important business upon a mere preponderance of proofs or considerations; and he may have many serious and reasonable misgivings as to the propriety of the step taken; but juries in criminal cases must acquit if there exist in their minds a single reasonable doubt. We, however, think the inference drawn from the instruction by counsel unwarranted. The language under consideration does not declare that the doubt being defined is one upon which a reasonable man would act. The jury are thereby informed that it is such a doubt as would cause a reasonable and prudent man to hesitate and pause; there is a vast difference between hesitating or pausing and acting. The doubt which leads a man to hesitate or pause may be very far from being such a doubt as would control his action. And we think that if in the important transactions of life a doubt arises in the mind of a reasonable and prudent man which would not lead him to hesitate, or to pause and consider of

his future action, that doubt is not such a reasonable doubt as would justify a jury in returning a verdict of acquittal. Upon a careful examination of the cases it will be found that the instructions on this subject which are held erroneous are those wherein the doubt is defined to be such an one as would control a reasonable man, or lead him to act.

11. The objection, urged by counsel for plaintiff in error, to the court's modification of the fifth instruction, asked in behalf of their client, is not well taken. By this instruction, as amended and given, the jury are substantially told that in cases where the conviction is to rest upon circumstantial evidence only, if there is any other reasonable theory or hypothesis upon which the killing may be accounted for, they are to acquit. We do not understand the law to be that any unreasonable or imaginary hypothesis, though it be supposed to arise from the evidence, will justify a verdict of not guilty: People v. Cronin, 34 Cal. 191; State v. Nelson, 11 Nev. 334; Hauser v. State, 58 Ga. 78.

12. The court did not err in refusing to give instructions numbered 3 and 4 asked by the defendant. Assuming these instructions to state correct propositions of law, they were fully covered by portions of the charge allowed, and while there are some cases which seem to recognize the doctrine that a good instruction asked should be given, though it be entirely cumulative, we think the converse is the better rule. When a proposition of law is once clearly stated, the repetition thereof, in the same or different language, could only tend to embarrass and confuse the jury.

13. The last position of counsel which we deem of sufficient importance to notice is that the evidence does not justify or sustain the verdict.

In view of the gravity of this case we have examined the voluminous record with more than the usual care. As a result of such investigation we do not feel warranted in interfering upon the ground of insufficient evidence. The conviction, it is true, is based upon circumstantial evidence. Yet there is woven about the defendant a web of circumstances which, coupled with his attempted explanations thereof, point irresistibly to him as one of the guilty parties. The effort to prove an *alibi* is not satisfactory, and his explanations of some of the suspicious incidents disclosed by the prosecution, such as his sudden acquisition of money, similar in denomination to that taken from the body of the deceased, were accompanied by so many improbable circumstances that the jury might well have regarded them as strong corroborating evidences of guilt.

The defense has been ably conducted throughout. From first to last counsel have spared no honorable effort to avert the demands of retributive justice. They have assigned for consideration, and skillfully argued in this court, every question which could possibly lay the foundation for legal interference; no stone has been left unturned in the effort to rescue their unhappy client from the doom awaiting him. But in the discharge of the duties imposed upon us, and under the sol-

emn obligation of our official oath, we are reluctantly compelled to say that they have been unsuccessful.

The judgment is affirmed, and, in pursuance of the statute, an order will be entered of record designating the fifth of February, A. D. 1886, as the date for executing the sentence pronounced.

FORM OF OATH OF JUROR, SUFFICIENCY OF: See State v. Angelo, 4 West Coast Rep. 482; Leonard v. Territory, 7 Id. 470.

PEOPLE EX REL. ATTORNEY-GENERAL *v.* GODDARD.

Filed December 4, 1885.

QUO WARRANTO—PROCEEDING TO OUST JUDGE.—In a proceeding to oust defendant from the office of judge of the district court, *held*, that in so far as the matters stated in the present information refer to defendant's disqualification to take the office in the first instance, the ground was fully covered by the former proceeding and decision, reported in 7 West Coast Rep. 24; that the matters now charged for the first time constitute a new and different cause of action, and that the supreme court is without jurisdiction, under the constitution, to entertain and investigate the same by proceedings in the nature of *quo warranto*.

QUO WARRANTO. The opinion states the facts.

T. H. Thomas, attorney-general, Thornton H. Thomas, and *Luther H. Dixon,* for the plaintiffs.

Charles S. Thomas, Clinton Reed, Joseph A. Taylor, William Kellogg, J. B. Bissell, and *C. I. Thompson,* for the defendant.

By the COURT. At the April term 1884 of this court an information in the nature of a *quo warranto* was filed against the above-named defendant, by the attorney-general upon his own relation, to oust said defendant from his office of judge of the district court of the fifth judicial district.

The charges preferred were to the effect that the defendant was disqualified to hold said office at the time of his election thereto, and at the time of his induction into office.

The attorney-general based the charges and rested the jurisdiction of this court to entertain them upon the English statute of 5 & 6 Edw. VI, c. 16.

The court however declined to entertain the information, upon the ground that the statute mentioned had been repealed by the legislature and was not in force in this state.

At the October special term this year the attorney-general asked leave to file an amended information in the same case, basing the charges therein contained upon section 6 of article 12 of the state constitution, as well as upon the statute of 5 & 6 Edw. VI.

The motion was set down for hearing and was discussed at length by counsel, both on the part of the state and on behalf of the defendant, briefs also being filed by both parties. The first three counts are substantially the same as those filed in the original information, and

relate to the antecedent disability of the defendant to take and administer the office to which he was elected. The remaining counts charge acts done by said defendant since his induction into office, which are alleged to disqualify him to hold and administer the duties thereof.

Previous to the hearing the attorney-general stated to the court and opposing counsel that if the information as amended could not be entertained he intended to strike out the counts charging the defendant's disability at the time of entering into office, and then file the document as an original information upon the charges contained in the remaining counts.

Thereupon, by agreement of counsel, as the court understood at the time, and as a matter of convenience, the subject-matter of both the amended and proposed original information were discussed and considered together upon objections made by the defendant thereto, in the nature of demurrers to the jurisdiction of the court to entertain either of such informations.

We have expended much time in a careful examination of authorities in respect to the question of jurisdiction, and have arrived at the following conclusions, in which all the members of the bench concur: 1. That in so far as the matters stated in the present information refer to defendant's disqualification to take the office in the first instance, the ground was fully covered by the former proceeding and decision; 2. That the matters now charged for the first time constitute a new and different cause of action, and the court is unanimously of the opinion that it is without jurisdiction, under the constitution, to entertain and investigate the same by proceedings in the nature of *quo warranto*. These conclusions dispose of the motion before the court. Differences of opinion exist among us as to the ground on which to base the defect of jurisdiction. For this reason, and the further reason that we are pressed for time, we deem it both unprofitable and unwise to discuss the subject in separate opinions upon the pending motion.

The motion is denied.

BOARD OF COUNTY COMMISSIONERS OF SAN MIGUEL CO. *v.* LONG.

Filed December 5, 1885.

CLERK OF DISTRICT COURT—FEES FOR MAKING JUROR'S CERTIFICATES.—Under section 1922 of the general statutes the clerk of the district court is not entitled to compensation for making and delivering the certificates to the jurors showing the number of days they have attended at each term; nor for taking the jurors' affidavits concerning their attendance.

ERROR to the district court of Ouray county. The opinion states the facts.

Enos Miles and *William Story*, for the plaintiff in error.

HELM, J. Defendant in error, being clerk of the district court of Ouray county, brought this action against the county commissioners in

the court below to recover fees from the county for taking and filing affidavits of jurors concerning their attendance upon court, and issuing certificates to them according to law.

To the complaint plaintiffs in error filed an answer, and defendant in error attacked the same by general demurrer. This demurrer the court sustained, and the commissioners electing to stand by their answer, judgment was rendered for the full amount claimed.

This judgment must be reversed. The first count of the answer sufficiently denies the matters averred in the complaint. It makes a full and complete issue of fact for trial by the court. Even if the second count were bad, plaintiff's general demurrer should have been overruled; the issue of fact ought to have been tried by the introduction and consideration of evidence before a judgment was rendered thereon.

But a reversal must be allowed in this case for another reason. Plaintiff's general demurrer, though challenging the sufficiency of the answer, is upon request to be carried back to the first defective pleading. And in accordance with the demand of counsel for defendants below, we are bound upon this demurrer to test the sufficiency of the complaint.

The second question presented, therefore, is, Did the complaint in this case itself state a cause of action?

The theory upon which the complaint was framed is: 1. That the clerk is entitled to his regular fees for taking the affidavits of jurors concerning their attendance upon court, and also for issuing certificates to them stating the time of such attendance, and the amount due therefor; 2. That the county is liable for the payment to him of such fees.

But section 1922 of the general statutes reads as follows: "The clerk shall, without fee, furnish to each juror who shall attend at any term of court a certificate showing the number of days that such juror shall have attended at such term; and upon presentation thereof to the county commissioners they shall issue to such juror their warrant upon the county treasurer for the payment of the *per diem* and mileage of such juror."

No construction of this statute is needed to show that the clerk is not entitled to compensation for making and delivering the certificates in question, as it is therein expressly declared that he shall do this act without fee. If he could demand a fee for taking a juror's affidavit concerning his attendance there is nothing in the law rendering the county liable therefor, and he would be compelled to collect the same from the juror himself. But we think the clear intent of the statute is that no compensation shall be charged for this service. The sole purpose of taking the affidavit in question is to inform the clerk as to the number of day's pay for attendance the juror is entitled to demand from the county. This is simply a prerequisite to the issuing of the certificate mentioned, being deemed an essential part of the proceeding in connection therewith; and we think the words "without fee" apply also thereto.

The judgment is reversed.

DANIELS *v.* MILLER, CLERK OF DISTRICT COURT.

Filed December 18, 1885.

APPEALS UNDER ACT OF 1885—BOND, WHEN REQUIRED—DUTY OF TRIAL COURT AS TO APPEALS.—Under the act of 1885, Sess. Laws, 350, regulating appeals to the supreme court, no bond is required in taking an appeal unless a stay of the judgment or order appealed from is desired; and neither the trial court nor judge has any function to perform in connection with the appeal, except when called upon by either party litigant to fix the amount of the bond for the stay of proceedings. The provision authorizing the judge under such circumstances to fix the bond is directory, and not mandatory.

THE SAME—TRIAL COURT CANNOT DETERMINE APPEALABILITY OF ORDER.—Under such statute the trial court or judge has no authority to determine, for the purpose of preventing an appeal, that a given judgment or order rendered or made by such court or judge is not appealable. The power to determine whether an appeal will lie from a given order or decree is vested solely in the supreme court.

THE SAME—ORDER FOR ALIMONY—STAY OF PENDING APPEAL—APPROVAL OF BOND BY CLERK—MANDAMUS.—One against whom an order for the payment of alimony and counsel fees has been rendered has the right, under such statute, to have the execution thereof stayed, pending an appeal therefrom, upon filing a stay bond. It is not necessary to the approval of such bond, or to its efficacy in operating as a stay, that the amount thereof should have been first fixed by the trial judge; and the action of such judge, in refusing to fix the amount of such bond for the reason, as expressed by him, that no appeal could be taken from the order, will not authorize the clerk of the district court to withhold his approval of said bond. If the clerk refuses his approval for such reason, he may be compelled by *mandamus* to give his approval.

MANDAMUS—WHEN LIES—WHAT PETITION MUST SHOW.—To authorize the issuance of a writ of *mandamus* the petitioner must show a legal right to have the act done which is sought by the writ; that such act is the plain, legal duty of the respondent to perform, without discretion on his part, either to do or to refuse; and that the writ will be availing as a remedy, and that the petitioner has no other plain, speedy, and adequate remedy.

PROCEDURE ON APPEAL—PRESENT AND FORMER STATUTE.—The distinctions and differences between the procedure on appeal under such statute, and that under the former statute, pointed out and discussed.

APPLICATION for writ of *mandamus*. The opinion states the facts.

Patterson & Thomas, and *Benedict & Phelps*, for the petitioner.

Teller & Orahood, for the respondent.

STONE, J. The questions presented arise upon demurrer to the petition filed in this court praying for a writ of *mandamus* to compel the respondent, as clerk of the district court of Arapahoe county, to approve and file a certain appeal bond tendered him for approval, as clerk aforesaid, in an action pending in said district court.

The petitioner sets forth in detail that one Lillian B. Daniels, wife of this petitioner, heretofore filed in said district court her complaint, praying that a certain agreement of separation of the said Lillian and this petitioner, as husband and wife, theretofore made and entered into by and between said parties, be set aside for reasons set forth in the complaint aforesaid, and also praying for specific alimony to be decreed the complainant, but not asking for a dissolution of the bonds of matrimony. For further relief the complainant prayed that a specific sum be decreed to be paid into court by the said William B. Daniels for costs and for attorney's fees, and a further sum to be paid monthly as alimony to the complainant *pendente lite*. That about the same time a certain other complaint was filed in said court by the said Lillian, praying

substantially the same relief as in the first-mentioned complaint. That full answers were filed to said complaints and that both parties filed affidavits touching the respective allegations of said complaints and answers. That thereafter the said district court, without a hearing upon the merits of the controversy, but upon the said pleadings and affidavits, ordered, adjudged, and decreed that this petitioner, the said William B. Daniels, should pay into court for the use of the complainant, the said Lillian, the sum of one thousand dollars, seven hundred dollars thereof as attorney's fees for her counsel, and three hundred dollars for her use in procuring testimony, and other expenses in the prosecution of her suit; and also the further sum of seventy-five dollars per month as alimony *pendente lite* until the further order of the said court.

That thereupon this petitioner duly served notice of his appeal from all of said order and decree, and that he moved the said court to fix the amount of the bond or undertaking on such appeal, which motion was denied for the reason that in the opinion of said court no appeal lay from said order and decree.

That thereafter said petitioner executed a bond with good and sufficient surety, for the purpose of having the same operate as a *supersedeas* or stay of the said order and decree pending the appeal therein, and tendered the same to the respondent Henry Sparnick, then clerk of said district court, and asked him to approve the same; but that said respondent, as clerk as aforesaid, refused so to do, and indorsed on said bond his reason for refusal in the following words and figures, to wit: "Tendered for approval this twenty-ninth day of October, A. D. 1885; but I decline to approve this bond, not because of the insufficiency of the surety, but because I feel bound to interpret the order of the district court in this matter as declaring the case to be one which does not permit appeal," and signed the said indorsement as clerk as aforesaid. The said bond is set out in the petition, and is in the sum of ten thousand dollars. Petitioner prays that the respondent Sparnick, as clerk of said district court, be commanded to approve said bond or show cause, etc.

Upon the facts set out in this petition, we allowed the alternative writ as prayed, counsel stipulating a waiver of the issuance and service of the writ, and that respondent would appear and obey the mandate by either approving the bond or showing cause on or before a day named. Thereafter, upon the day set for hearing (the respondent Sparnick having in the mean time deceased, and his successor in office, Arthur S. Miller, having been substituted as respondent herein), the respondent, by his counsel, appeared, and instead of obeying the writ elected to show cause by demurring to the petition on the ground that the facts therein stated were insufficient to warrant the issuance of the writ prayed.

The questions for our determination upon the issue thus made depend for solution chiefly upon the terms and construction of the late statute: Sess. Laws 1885, 350, entitled "An act in relation to appeals

to the supreme court, and concerning the jurisdiction thereof and practice therein."

The principal question involved is, whether the clerk of the trial court has under said act discretionary authority to refuse the approval of an appeal bond on the ground that the judge of said court has held that the order or judgment from which an appeal is sought is not appealable.

Underlying this question, and as a corollary thereto, is the question, Has the trial court itself or the judge thereof, the power or discretion to refuse an appeal or determine that an appeal will not lie when sought under the provisions of the act mentioned?

The first section of the act declares that "the supreme court has appellate jurisdiction over all judgments and decisions, of all other courts of record, as well in case of civil actions as in proceedings of a special or independent character."

Section 2 of the act is as follows: "An appeal may also be taken to the supreme court from the following orders made by the trial court or the judge thereof: 1. An order made affecting a substantial right in an action when such order in effect determines the action and prevents a judgment from which an appeal might be taken; 2. A final order made in special proceedings affecting a substantial right therein, or made on a summary application in an action after judgment; 3. When an order grants or refuses, continues or modifies a provisional remedy; or grants, refuses, dissolves, or refuses to dissolve an injunction or attachment; when it grants or refuses a new trial, or when it sustains or overrules a demurrer; 4. An order or judgment of *habeas corpus*."

Section 8 of the act providing the manner of taking appeals is as follows: "An appeal is taken by filing with the clerk of the court in which the judgment or order appealed from is entered or filed, a notice stating the appeal from the same, or some specific part thereof, and serving a copy of the notice of appeal upon the adverse party or his attorney."

Section 9 declares that "upon receipt of such notice by the clerk, and proof of service of a copy thereof on the adverse party or his attorney, and the payment or securing of his fees for the transcript hereinafter mentioned, the clerk shall forthwith transmit to the clerk of the supreme court a transcript of the judgment or order appealed from, or so much thereof as is mentioned in the notice; the notice of appeal and the undertaking on appeal, if any, and so much of the record in the case additional as the appellant in writing may direct."

Section 23 is as follows: "An appeal shall not stay proceedings on the judgment or order, or any part thereof, unless the appellant shall cause to be executed before the clerk of the court which rendered the judgment or order, by one or more sufficient sureties, to be approved by such clerk, an undertaking to the effect that they are bound, in double the amount named in the judgment or order, that the appellant shall pay to the appellee all costs and damages that shall be adjudged to the appellee on the appeal, and also that the appellant will satisfy and

perform the judgment or order appealed from in case it shall be affirmed, and any judgment or order which the supreme court may render, or order to be rendered by the inferior court, not exceeding in amount or value the original judgment or order, and all rents or damages to property during the pendency of the appeal, out of the possession of which the appellee is kept by reason of the appeal. If the undertaking is intended to stay proceedings on a part only of the judgment or order, it shall be varied so as to secure the part stayed alone. When such undertaking has been approved by the clerk and filed he shall issue a written order, commanding the appellee and all others to stay proceedings on such judgment or order, or on such part as is superseded, as the case may be. No appeal or stay shall vacate or affect the judgment appealed from. The undertaking shall in no case be for a less sum than three hundred dollars; provided, that the trial judge may, on showing of either party, fix the amount of the undertaking."

The portions of the statute above quoted we think embrace all the provisions therein which bear upon the questions before us.

Among the radical changes which this statute makes in the practice concerning appeals, it will be observed that no bond is required in taking an appeal, unless a stay of the judgment or order appealed from is desired. It is also noticeable that the court or judge has nothing to do in the matter of taking the appeal. Indeed, except in the cases provided for in section 24, where the appellant stands in a fiduciary capacity, or is a municipal corporation, neither the court nor judge has any function to perform in connection with the appeal, unless when the judge may be called upon by either party litigant to fix the amount of the bond for stay of proceedings. This last provision, we take it, is intended to apply to cases where there is not a money judgment, or where the amount is indefinite, in which case either party may elect to call upon the trial judge to assume the responsibility of fixing the amount of the undertaking.

It was argued by counsel for respondent that this provision that the judge may fix the amount of the bond is to be construed as mandatory in cases where the judgment or order is not for such specific sum as that it may be doubled in the bond; but we are inclined to hold, in view of all the provisions of the statute relating to the taking of the appeal, that the provision in question is directory, and as we have stated above, permits the parties, or either of them, to elect to call upon the judge for such purpose. Let us see how the law, as thus construed, would operate. Suppose that in any case in which this provision is applicable the appellant chooses to fix the amount of the bond without requesting the judge therefor; if the appellee is dissatisfied therewith, he is at liberty to present a showing to the judge as a reason why the amount of the bond should properly be fixed by such judge. If the appellee takes no steps for such purpose, he may properly be deemed to have no objection, or to have waived objection to the course pursued by the appellant in the matter. Afterwards, when the appeal has been taken, the appellee has a right, under section 25

of said act, to move in the appellate court against the bond, if considered defective, or the sureties insufficient. These provisions appear reasonable, and calculated to insure fairness to both parties. On the other hand, if the provision that the judge may fix the amount of the bond were to be construed as mandatory in such cases, and such judge should neglect or refuse to act therein, a difficulty would result which would not be entailed by the other construction we have adopted.

It was strongly contended by counsel for respondent, in argument, that the writ of *mandamus* will not lie to compel the clerk to act contrary to the order of the court or judge; that the judge in this case is the real party against which the writ ought to run, for that the clerk is the mere mouth-piece and recording officer of the judge; and High on Mandamus is cited in support of this contention. What is stated by Mr. High in the citation mentioned, section 184, rests upon the cited case of State v. Engleman, 45 Mo. 27, where the court below on an appeal from its judgment had granted the appeal on condition that no transcript should be made by the clerk until the appellant had filed an appeal bond, and on petition for *mandamus* to compel the clerk to make out the transcript without filing the bond, the supreme court held that while the order of the court below requiring the appeal bond was unwarranted, yet as the petitioner had a ready remedy by writ of error, which would have taken up the transcript as soon as the unconditional appeal, the writ of *mandamus* was therefore unnecessary and was accordingly refused.

The case before us is very different. Here the appeal bond in question is for the purpose of operating as a *supersedeas*, and for that purpose is required by the statute. And in this case there was no remedy by writ of error. In reply to this contention of counsel for the respondent that *mandamus* will not lie to compel the clerk to disobey the order of the court or judge, it was asserted by counsel for petitioner that in this case it is substantially shown by the averments of the petition, the court made no order that the judgment or order appealed from is not appealable, and that therefore the clerk was not bound by any such order, none having been made upon inspection of the transcript filed here in the principal case, we find this statement of counsel to be correct. The order of the court was for the payment of the several sums of money for costs, attorney's fees, and monthly allowances as alimony *pendente lite*. The appeal was taken from this order and the bill of exceptions signed by the judge, after reciting the said judgment or order, and the notice of appeal therefrom, further recites in conclusion as follows: "And having filed the notice of said appeal with the clerk of said court, and having served the plaintiff's attorney with a copy thereof, said defendant applied to the said court to fix the amount of the appeal bond to be given, which application the said court refused, and declined to fix the amount of said bond, holding that no appeal would lie from the aforesaid order or any part thereof, to which ruling of the court the defendant, also by his counsel, then and there excepted," etc. From which it will be seen that this "ruling"

of the court is recited in the bill of exceptions merely as a reason which the judge himself gave for refusing to fix the amount of the bond. And, according to the indorsement of the clerk on the bond, the sole reason for the refusal of the clerk to approve the bond was because he "interpreted" the order of the court in the matter "as declaring the case to be one which does not permit an appeal," and not for any defect or insufficiency of the bond itself.

It is conceded that *mandamus* will lie to compel an officer to act only when it is his plain duty to act in the manner prayed for. The question here then to be first considered is, Was it the clear duty of the respondent to approve the bond tendered in this case?

The bond being good and sufficient, as is admitted, and not being absolutely required to have the amount therein first fixed by the court or judge as we hold, and the other prerequisites for taking the appeal having been complied with under the statute, we think it became and was the clear duty of the respondent to approve and file the bond, and to issue the order for stay thereon. accordingly, unless the reason for his refusal given by him, as indorsed on the bond, was a sufficient reason for such refusal. This brings us to consider the question whether the ruling or opinion of the court or judge respecting the appealability of the order appealed from was such as imposed a duty on the respondent to refuse the approval of the bond, and also whether the court or judge had authority or discretion to make an order or ruling denying the appeal. We think both these questions must be decided in the negative.

It was urged in argument by counsel for respondent that *mandamus* will not lie to control or interfere with the judgment or discretion of an officer in the performance of an official act, and that in this case whether it be the act of the court or clerk which is to be effected by the writ, the above principle of the law of *mandamus* is applicable. Aside from the question of its applicability to this case, the soundness of the doctrine thus announced is unquestioned, and it has been so laid down by the court repeatedly heretofore as a first principle in the law governing the issuance of this writ. But whether there was authority for the exercise of discretion by the judge or clerk in this case is the very question before us to determine.

Upon full consideration of the statute under which the appeal in question is taken, and viewing all its parts with respect to the purpose and intent as a whole, we are constrained to conclude that it is not within the province or authority of the court or trial judge to determine, for the purpose of preventing an appeal, that a given judgment or order rendered or made by such court or judge is not appealable. The statute itself in the first two sections of the act declares in what cases appeals will lie to the supreme court, and this enumeration was doubtless intended to furnish a sufficient guide to both bench and bar. A comparison of the manner in which appeals are taken under this new act with the mode prescribed by the former law will serve to throw light on the legislative intent contemplated by the change. The

former law (section 415, code of 1883) required the appeal to be prayed for within a certain time after the judgment; it required a bond in a "reasonable sum" to be filed within a time to be fixed by the court; it required the bond to be approved by the court or by the clerk when the order granting such appeal so directed. Under the present law, the new act under which the appeal in question was taken, the appellant is not required to pray the court for the appeal; no leave is asked or granted, no bond is required; the statute fixes the amount of the *supersedeas* bond in ordinary cases, and the judge is only authorized to fix such amount when a showing by one of the parties is made for that purpose. In short, to take an appeal simply without a stay of execution, no function or act of the court or judge is required or called into exercise. The appeal is taken solely by the act of the party desiring to appeal upon his filing a notice thereof with the clerk, and serving a copy on the adverse party or his attorney.

Therefore, without any authority being conferred by the statute upon the court, or judge to pronounce his judgment, exercise his discretion, or perform any office whatever in the matter of taking the appeal, there is certainly no statutory warrant for such court or judge to otherwise interfere by determining or declaring that an appeal will not lie in any given case which the appellant himself by his counsel may determine is embraced within the appealable cases enumerated in the statute. If the statute warranted it, we should be pleased to come to a different conclusion upon this point, in view of the business of our supreme court, since the unlimited number of appeals that may now be taken from judgments and orders of the various courts of record opens the door to a possible abuse in not only taking appeals for delaying trials and harassing litigants in the trial courts, but also in thrusting upon the supreme court such an increased amount of business as might put it beyond the power of the present number of judges to dispose of without serious delay.

It is therefore not without careful consideration that we have come to the conclusion that the authority to decide and determine whether an appeal will lie to this court from a given judgment, decree, or order rendered or made in the trial court, is vested solely in the supreme court when the matter is brought up here for review, and the question properly raised in this court by motion or otherwise. We have not deemed it necessary to refer to the numerous authorities cited and discussed by counsel on both sides in the argument upon hearing, for the reason that they are all either declaratory of, or in support of, propositions and principles of the general law of *mandamus*, of unquestioned soundness, and which may be admitted by both sides; or are applicable only to the particular cases cited, and not in point here.

The chief requisites in a petition to warrant the issuance of a writ of *mandamus* are: 1. The petitioner must show a legal right to have the act done which is sought by the writ; 2. It must appear that the act which is to be enforced by the mandate is that which it is the plain legal duty of the respondent to perform, without discretion on his part

either to do or refuse; 3. That the said writ be availing as a remedy, and that the petitioner has no other plain, speedy, and adequate remedy.

That the petitioner here has no other such remedy for the purpose of effecting a stay of the judgment and order appealed from, is evident from the nature of the case, and the provisions of the statute relating thereto.

A writ of error under our practice acts will lie only to review a final judgment in a cause, and will not lie to an order in any case, so that the petitioner was without the remedy, if that remedy were even adequate in such a case as this. The only other remedy suggested by counsel for respondent in argument was a suit to recover back the money ordered paid in case the order therefor should be reversed by the supreme court, but it is not pretended that this would be a speedy or adequate remedy.

The absolute right to an appeal is given by the statute in the cases specified therein. The right to a stay of the judgment or order appealed from is a right also given by the same statute. And upon compliance with the conditions prescribed, the right to such stay is as clear and absolute as the right to an appeal.

The stay is not restricted by the statute to a particular class of cases within those that are appealable. The statute enacts that an appeal shall not operate to stay proceedings unless a bond is executed by the appellant and approved and filed by the clerk, as provided in section 23 of the act (with the exceptions mentioned in section 24); and it seems a plain inference that whenever such bond is given in any case a right to such stay is given the appellant by force of the statute—a right which neither the judge nor clerk has any authority or discretion to deny. When the requisite bond is tendered, the clerk has only the ministerial duty to approve and file it, and thereupon to issue the order staying proceedings.

Section 24 declares that when a municipal corporation is appellant the court or judge shall direct a stay of execution after appeal upon the mere motion of the appellant without the filing of such bond and it is certainly fair to conclude that a right to a stay which is thus expressed in mandatory terms by the statute to be given where no bond whatever is required is no higher or more certain right than is conferred upon an appellant in cases where he is required to give a *supersedeas* bond, as in this case.

I conclude therefore, upon the facts set out in the petition:

1. That the petitioner had a legal right under the statute to a stay of the judgment and order appealed from; and to effect the same had a right to have the bond therefor approved by the respondent as the law directs.

2. That the trial court or judge had no authority to prevent the taking of the appeal nor to adjudge or order that an appeal did not lie.

3. That neither said court nor judge made any order denying the appeal, or that the same would not lie, and hence there was no judicial

interference with the right and duty of the respondent clerk to approve and file the bond tendered. Had such an order been made a different question would have been presented and one that we are not now called upon to discuss and decide.

4. That it was not essential to the approval of the bond, or to its efficacy in operating as a stay, that the amount should have first been fixed by said judge.

5. That the action of said judge in refusing to fix the amount of the bond and his expressed reason for such refusal furnished no sufficient ground for the respondent to withhold his approval of said bond.

6. That the respondent as clerk of said court had no discretion to decline or refuse to approve said bond, and that it was his clear duty to approve the same.

7. That the petitioner has no other plain, speedy, and adequate remedy.

The petition being held sufficient the demurrer thereto is overruled and the peremptory writ ordered to issue as prayed.

Writ ordered.

HELM, J., concurring. I concur with my brother Stone in the conclusion that upon the showing made the alternative writ in this case should be made peremptory for the following reasons:

1. The statute in question confers the right of an appeal upon the unsuccessful party absolutely. As to whether or not a review in this way may take place, the trial court has no voice whatever. When a party has served upon his adversary by copy the requisite notice, and filed the same with the clerk, the appeal is perfected; nothing there remains to be done in connection therewith, except for the clerk, upon proof of such service and tender or payment of fees, to forward the transcript as directed by law.

2. A *supersedeas* is not essential to the appeal or review. It is an incidental and collateral privilege which appellant may or may not invoke. If the judgment or order from which he has perfected his appeal be for money only, save the discretion with reference to security, and command as to the undertaking embodied in section 24, the court has no voice or authority whatever in connection with the *supersedeas*. Upon tender of a bond for a proper amount appropriately conditioned, and with sufficient sureties, appellant is entitled as a matter of right to have the same approved and filed by the clerk.

If the judgment does not mention a sum certain, it may become the duty of the court to fix the amount of the undertaking which appellant shall file.

But I cannot believe that when the statute denies him any voice in determining whether or not the appeal will lie it was intended that he should be permitted to refuse this request because there may, in his judgment, be no appealable order. To say that he can for this reason decline to fix the amount of the bond would be to admit that while he is powerless to deny the right of appeal and preclude a review, yet he

may take from a party all the benefits of such an appeal or review by preventing the issue of a *supersedeas*.

3. Unless I misread or misunderstand the statute, the clerk also has but little if any discretion. When a bond is tendered which he admits, as in the case at bar, to be sufficient in every particular, it is his duty to approve and file the same; he cannot be permitted to decline the performance of this ministerial duty simply because in his judgment the order appealed from was not appealable. Whether or not an appeal lies in a given case is a judicial question, and if the clerk can decline to approve a bond because he may think the appeal was improperly taken there is lodged in his hands judicial power; he is enabled to accomplish that which we say the court itself cannot do. He would often prevent appellant's deriving the full benefit of a reversal when one is secured, by depriving him of the stay of execution sought.

4. I think the clerk should be required to perform his duty in connection with the *supersedeas*, even though the appeal itself be afterwards dismissed by this court, on the ground that there was no appealable order. For if the trial court itself cannot pass upon the right of appeal, and if the clerk has no voice in determining that matter, I cannot conceive how it may become an important question upon such applications as the one before us. When the clerk states as the sole reason for his refusal to approve the bond tendered that no appeal lies, and upon an application to compel such approval we rest our decision on the correctness of his finding, it seems to me that we thereby clothe him with the very function which the statute denies either to him or the court. The fact that no appeal lies, if such be the fact, does not excuse him from approving the bond.

That is a question to be raised in a different way. When the legislature made the appeal an absolute right, and deprived the trial court of all discretion in the matter, they intended also to give in the same manner the collateral right to a *supersedeas*.

It was the purpose of that body to allow, upon tender of a sufficient bond, a stay of proceedings under the order or judgment until the appeal itself was here either dismissed or determined upon its merits.

In the case at bar, however, it appears that the clerk, instead of acting upon his own judgment, declined to approve the bond because he understood the court to be of opinion that no appeal lay. As shown by the record, no judgment or order to this effect was made or entered by the court or judge; but if it had been, still I do not believe the clerk would be justified in his refusal. For if the court be guilty of a clear usurpation of power, the order resulting therefrom is illegal and void, and such void order constitutes no justification for the clerk's refusal to perform a plain duty clearly devolved upon him by law. In such case, if there be no other plain, speedy, or adequate remedy for the party aggrieved, I believe that the performance of the duty ought to be coerced by *mandamus*. Such is the situation here as to the remedy.

The illegal action of the clerk is in no way reviewable; appellant cannot invoke relief in this court by error. Under the present, as under the former practice, no writ of error lies to review anything save a final judgment, and before proceedings on his appeal could be terminated the evils appellant sought to avert by *supersedeas* would be suffered.

I do not think that the proceeding mentioned in section 31 of the act, or appellant's ultimate right of action for damages against an insolvent and worthless judgment creditor who has sold appellant's property under execution, and placed the proceeds beyond his reach, is such an adequate remedy as will debar the proceeding by *mandamus*.

5. Such I believe to be a correct interpretation of the statute in question according to its letter and spirit. But it seems to me that these conclusions are also supported by strong considerations of public policy. If all the trial courts of the state whose proceedings may be brought here for review were at liberty to say that an appeal did or did not lie there would exist great confusion in practice. Under the law a large number of orders are made appealable; as to whether or not an appeal will lie from a particular order may be a close and perplexing question.

Consequently the various courts in the state would probably take different views of the same or similar orders; and in one section appeals would be allowed, where in another they would be denied.

This suggestion also applies to the clerk's action in the approval of appeal bonds and allowance of "*supersedeas;*" one clerk would decline to approve a bond upon the ground that the appeal was improperly taken; another clerk would hold the appeal warranted, and indorse upon the bond the requisite sanction.

The proposition that there should be but a single tribunal to pass upon this question addressed itself strongly to my mind.

I deplore the conclusion, because it must inevitably result in materially increasing the business of this court.

A great many appeals will be taken, and a large proportion of our time for several months in the future must be occupied in determining motions to dismiss based upon the ground that the particular orders were not appealable. But the interest of litigants, as well as the importance of uniformity in practice, demand that the doubt, if a doubt existed, should be resolved in favor of the exclusive jurisdiction of this court in the premises.

As will be observed, I venture no opinion concerning the appealability of the order referred to in this discussion. No objection is presented to the bond here tendered on account of the sum named therein as a penalty.

Such sum appears to be amply sufficient to more than twice cover all possible liability of relator in the premises. I therefore think, with Mr. Justice Stone, that under the circumstances the fact of there being no order of court fixing the amount of the undertaking in no way affects the views above expressed: Sharon v. Sharon, 8 West Coast Rep. 351.

BECK, C. J., concurring. The majority of the bench are of opinion that the demurrer to the petition should be overruled. In this conclusion I concur, but not in the reasoning by which this conclusion is arrived at.

My concurrence is based upon a legal proposition of which I entertain no doubt under the present issue, viz., that the order from which this appeal is prosecuted is an appealable order. If it were a non-appealable order, then in my judgment the demurrer should be sustained, and I conceive it to be the duty of the court to determine this point before issuing the mandate sought. This is not simply a question of the construction of a statute, but it involves the application of an extraordinary remedy.

It is my understanding of the law that the writ of *mandamus* ought not to issue unless the following jurisdictional facts be made to appear: 1. A clear legal right in the party praying the writ to have the act performed, for which he seeks the aid of the writ; 2. A clear legal duty to act on part of the officer sought to be coerced; 3. That the writ when issued will be effectual as a remedy.

If this is an appealable order, then all these conditions exist, otherwise they do not.

Referring to the late statute on the subject of appeals in civil actions, I find it provides in the first instance from what judgments and orders appeals to this court may be taken. Neither a party to a judgment, nor an officer of the trial court, is authorized by that statute to take any steps toward perfecting appeals, save in the cases made appealable by the statute. Should they therefore proceed and perfect appeals in unauthorized cases, this court would be without jurisdiction to entertain them.

No litigant can say he has a right to have an appeal perfected unless that right has been conferred upon him by statute.

The statute was enacted for the benefit and guidance of the people. Like all remedial statutes, it states the cases to which it applies, and only those entitled to the benefit of its enactments have a legal right to take advantage of them. It is illogical to say, because a litigant who may be entitled to an appeal is authorized to perform the initiatory steps himself, as the serving of notice of an appeal, that persons against whom judgments or orders not appealable are entered may, by pursuing the same steps, have an appeal to this court. If such a person should succeed in getting the record of a cause transferred to this court, he would have here an illegal proceeding, one to which he could show no statutory right, and wholly ineffectual to him as a remedy.

To hold otherwise would be to say that after restricting the remedy by appeal within certain defined boundaries, and after limiting the appellate jurisdiction to cases falling within the limitations prescribed, the legislature then enacted an inconsistent provision which authorized appeals to be taken and perfected in all cases, irrespective alike of the specifications previously made or of the jurisdiction previously conferred on the appellate court.

It would also follow, as a result of such inconsistent provision, that the officers of the trial courts would be bound to assist litigants in perfecting appeals to the supreme court in cases made non-appealable by the statute, and over which this court would not be vested with appellate jurisdiction.

In my judgment such is not a correct interpretation of the statute under consideration. On the contrary, my view is that all its remedial provisions are limited to the cases wherein appeals are provided for, and to no other cases. And if this be true, then whether a judge be called upon to fix the amount of a bond intended to operate as a stay of proceedings, or a clerk be requested to approve a similar bond wherein the amount of the penalty and the sureties therein are both sufficient and satisfactory, if the case be non-appealable, no legal obligation rests upon either officer to perform the act demanded. The statute is their guide. It is also a guide to all who have duties to perform in relation to the subject-matter of appeals, whether those duties be ministerial or judicial. Ministerial officers have no discretion as to their duly prescribed duties, but the rule goes no further. If a demand be made upon them to perform acts falling outside their duties as prescribed by statute, they are under no obligation to perform them. The books say that such officers cannot be compelled by *mandamus* to perform acts not falling within the duties so prescribed. They say *mandamus* is the appropriate remedy to enforce the performance of an official duty clearly enjoined by statute, but to entitle the relator to the writ as against a public officer, he must show a clear right to the performance of the thing demanded

An officer whose duties are ministerial is not a machine, but a reasoning being whose duties are prescribed and limited by law; and while they are denominated ministerial duties, they partake so far of a judicial nature as to require the exercise of his judgment in every instance before he performs or refuses to perform the same. If he refuse to perform and the duty to perform exists, he may be coerced by *mandamus;* but if his judgment be correct in such refusal, and for any reason the supposed duty does not exist, I understand the rule of law to be, that he will not be compelled to perform it.

Another rule is the familiar one, that the writ will not issue where there is another plain, speedy, and adequate remedy in the ordinary course of law.

In the application of the foregoing principles to the case before us, the first inquiry is, Has the relator a clear legal right to the performance of the act demanded, that is, to have the *supersedeas* bond which he tendered approved? If the right exists, it is a statutory right, and necessarily depends upon his right of appeal. Believing, therefore, that the order appealed from falls legitimately within the list of appealable orders, and being substantially a money judgment against him, this inquiry must be resolved affirmatively.

Second, does a clear legal duty exist on the part of the clerk below to approve the bond tendered? It follows from the preceding proposi-

tion and answer, from the provisions of the statute, and from the return on the bond, that the predecessor in office of the present respondent erroneously refused to approve the bond.

Third, will the writ, when issued, prove effectual as a remedy? It will effectuate all that is demanded, a stay of proceedings in the district court, until the order appealed from can be reviewed in this court. This is a sufficient remedy.

Fourth, is there any other plain, speedy, and adequate remedy in the usual course of law? This is the only question about which I entertain a doubt; but since no other adequate remedy is plainly given by statute, or has been announced by the decisions of this court in like cases, I think the answer should be in the negative upon this application.

For the reasons above given the demurrer should be overruled.

MANDAMUS, WHEN LIES: Generally, see Arberry v. Beavers, 55 Am. Dec. 791, and note 806; to try title to office: People v. Olds, 58 Id. 398, and note; to compel issue of attachment: Id.; signing bill of exceptions: Drexel v. Man, 40 Id. 573, and note; Careaga v. Fernald, 5 West Coast Rep. 225; issue of execution: Hamilton v. Tutt, 1 Id. 858; Habersham v. Sears, 5 Id. 113; to reinstate attorney: People v. Turner, 52 Am. Dec. 295, note 302; against governor or executive: In re Dennett, 54 Id. 602, and note; Hawkins v. Governor, 33 Id. 346, and note 362.

KING v. DE COURSEY.

Filed December 18, 1885.

VARIANCE BETWEEN PLEADINGS AND PROOFS—OBJECTION CANNOT BE FIRST RAISED ON APPEAL.—Where the complaint states a cause of action in the nature of an *indebitatus assumpsit*, and the answer denies the indebtedness for the cause alleged, "or otherwise," the defendant cannot for the first time in the supreme court, raise the question of variance between the pleadings and the proofs, when no such question was raised in the lower court.

APPEAL from the county court of El Paso county. The opinion states the facts.

J. L. Williams, for the appellant.

John Campbell, for the appellee.

BECK, C. J. The errors assigned in this case are as follows: 1. The court erred in ordering judgment to be entered, and rendering judgment against said defendant Edward J. King and in favor of said plaintiff for the sum of two hundred and fifty dollars damages;

2. The court erred in rendering judgment for said or any sum in favor of said plaintiff and against said defendant;

3. The judgment is contrary to the law and testimony in said cause;

4. The judgment should have been for defendant and against said plaintiff.

The point relied upon for a reversal is, that there was a variance between the complaint and the evidence, and that the evidence did not support the complaint.

That the proof offered tended to show a special contract placing property for sale on commission in the hands of De Coursey, the plaintiff below, to be sold by him at a commission, and a breach of that contract by the defendant, by his withdrawal of the property before the expiration of the time allowed him by the contract to make sale thereof.

Counsel for defendant, King, say the declaration is in form an *indebitatus assumpsit* for money due for work and services, whereas the evidence shows a special contract and breach thereof, which ought to have been specially declared on.

The complaint is as follows: "The plaintiff complains and alleges: 1. That the defendant is indebted to the plaintiff in the sum of two hundred and seventy-five dollars, on account, for services as broker in the sale of real estate, performed at the request of the defendant at the city of Colorado Springs, El Paso county, Colorado, between the fifth day of October, 1881, and the fifth day of December, 1881; 2. That the defendant has not paid the same. Wherefore plaintiff demands judgment against defendant in the sum of two hundred and seventy-five dollars ($275), with interest and costs of this action."

To this complaint the defendant answered thus: "The defendant, answering plaintiff's complaint filed herein, says: That he is not indebted to the plaintiff in the sum of two hundred and seventy-five dollars, or in any other sum, on account of or for services as broker in the sale of real estate, performed at the request of this defendant at the city of Colorado Springs, El Paso county, Colorado, between the fifth day of October, 1881, and the fifth day of December, 1881, or at any other time or place, and defendant says he is in no manner indebted to the plaintiff, as alleged in said complaint, or otherwise."

The above comprise the pleadings in the cause.

The cause was tried to the court without a jury.

The evidence of the plaintiff was to the effect that in consideration of one hundred dollars, paid the defendant, the latter put certain real estate into his hands for sale, he being a real-estate broker, for a definite period of time, upon a commission; and that before the expiration of that time the defendant sold the property himself, thus depriving plaintiff of the opportunity to make the sale, and then refused to pay the commission.

The defendant in his testimony denied the contract, and most of the facts stated by the plaintiff, and upon this testimony as to the cause of action and defense thereto, the cause was submitted to the judge of the county court, who found the issues for the plaintiff, and assessed his damages at two hundred and fifty dollars.

The defendant excepted to the findings and judgment, and thereupon prayed this appeal.

He saved no exceptions to the evidence; he failed to raise the point of a variance between the pleadings and the proof upon the trial, but permitted the trial to proceed to judgment without objection in any form.

The plaintiff produced proof to the effect that owing to business changes and improvements which had occurred in the vicinity of the property in question, the same was in demand and salable at the time defendant sold it, and that plaintiff had an opportunity to sell the same under his contract, and to earn his commission, which was defeated by the wrongful act of the defendant.

The only question necessary to be considered is, Can the defendant now for the first time raise the question of variance between the pleadings and the proofs, which he might have raised in the lower court?

The complaint clearly states a cause of action. The evidence must be held to have justified the finding and judgment, so far as its sufficiency is concerned.

The principal witnesses in the case were the parties themselves. Other witnesses were called only as to collateral facts. Neither party claims to have been surprised; both parties evidently knew the precise issue to be tried, and they tried the cause on the merits without raising any question of irregularity. Had such question been raised, the plaintiff might have had an opportunity to amend if necessary. An amendment would not have created a different cause of action; besides, the form of the answer, that defendant was not indebted to the plaintiff as alleged in the complaint, "or otherwise," must be considered as a denial that the defendant was in any manner indebted to the plaintiff on account of the subject-matter of the complaint, whether in the precise form as stated or not.

Such an answer after judgment must be construed in aid of the judgment, where the subject-matter of the action is covered by the complaint, and no question of insufficiency or variance was raised on the trial.

Our civil code says: "Sec. 81. The court shall in every stage of an action disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the parties, and no judgment shall be reversed or affected by reason of such error or defect."

Provision is made in the same section for amendments to the pleadings when the evidence shall vary from the allegations thereof. This may be done when the attention of the court is called to the defect by objection, motion, or otherwise, if the defect is amendable.

Mr. Bliss says: "When an action is instituted or a defense presented, the opposite party may insist that the rules of statement, and other rules found necessary or expedient, shall be observed. . . . . It by no means follows that because certain rules of procedure are calculated to secure the ends of justice all proceedings shall be treated as invalid in which they have not been followed. This obligation upon one party is supposed to be provided for the protection of the other, and if the latter does not seek such protection—if with their violation before his eyes he proceeds in the cause as though they had been observed it would be a trifling for courts to permit him afterwards to go back and stop or vacate the proceedings because of their non-observ-

ance:" Bliss on Code Pleading, sec. 435. That is just what defendant below is attempting to do here, but the plainest principles of law and justice estop him from now raising objections of this nature. It is now too late to raise questions of the character here presented, and it is wholly unnecessary to consider them further.

The judgment must be affirmed.

HUGHES *v.* PEOPLE.

Filed December 18, 1885.

ACT CONSTITUTING TWO OFFENSES—PRIOR CONVICTION.—Where the same act constitutes two distinct offenses, one against the state and the other against the municipality wherein it was committed, a conviction for the offense against the latter is no bar to an action by the state.

THE SAME—DEMURRER TO PLEA OF PRIOR CONVICTION.—A plea of former conviction, notwithstanding an averment that the offense of which the defendant had been convicted and that of which he stood charged were one and the same, may be demurred to, and the demurrer sustained, if the plea further sets forth facts from which it appeared that the two offenses were separate and distinct.

THE SAME—JUDGMENT MAY BE ENTERED UPON SUSTAINING DEMURRER.—Upon sustaining a demurrer to a plea of former conviction, the court has power to enter judgment against the defendant the same as after trial and verdict of guilty.

ERROR to the district court of El Paso county. The opinion states the facts.

J. L. Williams, for the plaintiff in error.

T. H. Thomas, attorney-general, for the defendant in error.

STONE, J. Plaintiff in error was indicted for disturbing the peace, and upon arraignment pleaded in bar a former trial and conviction for the same offense, under an ordinance of the town of Colorado Springs, within the limits of which town the act was committed.

To this plea the prosecution demurred and the demurrer was sustained, whereupon the court rendered judgment against the accused, the same as upon trial and verdict of guilty.

The principal questions presented for review and argued by counsel are: 1. Was the plea of the former conviction good? and 2. Was it error for the court upon sustaining the demurrer to the said plea in bar to give final judgment?

Upon the first question there is a diversity of opinion by the authorities, some holding that under the general rule that no person may be punished twice for the same offense, a plea of former conviction such as was interposed by the plaintiff in error here, should be held a bar to the prosecution in which it is pleaded.

The cases most in point which we have been able to find in support of the foregoing doctrine are the following, which are cited in the brief of counsel for plaintiff in error: State v. Thornton, 37 Mo. 360; State v. Cowan, 29 Id. 330; State v. Welch, 36 Conn. 216.

Most of the authorities holding this view, while recognizing the rule against double punishments, make a distinction between an act which constitutes but one offense, and an act which may be two offenses, for each of which the perpetrator may be punished separately.

Some of these authorities rest this distinction on the ground that the one act may constitute two different offenses against two distinct sovereignties or jurisdictional authorities: Moore v. People, 14 How. 13; Ambrose v. State, 6 Ind. 351; Greenwood v. State, 6 Baxt. 567.

Another distinction made in a certain class of cases is that one is a criminal and the other a civil proceeding, that while the proceeding under the town ordinances is to recover a sum as a penalty it is a civil proceeding, and hence not a bar to a prosecution by the state for the same act: Levi v. State, 6 Ind. 281.

Still another distinction is that the municipal authority vested in a town or city under its ordinances is exercised as a police power, delegated by the legislature in contradistinction to the general judicial power of the state to punish offenses made such by general law: Shafer v. Mumma, 17 Md. 331. While I cannot help regarding these distinctions as refined, and more fictitious than real, and while the reasons given in the decisions in justification of what, after all, is practically double punishment for the same act, fail to satisfy me of the logical soundness of the doctrine, yet the great weight of authority appears to uphold this view: that in a case like this before us, the single act, being made punishable both by the general law of the state and by the ordinances of the town wherein it was committed, constitutes two distinct and several offenses, subject to punishment by the proper tribunals of the state and the municipality respectively; and we must therefore yield assent to the doctrine which we concede rests upon the greater weight of recognized authority.

Mr. Dillon, in his work on municipal corporations, discusses this question fully, and concludes that the great weight of authority is as we have stated it above, although upon the precise question he puts, "Can the same act be twice punished, once under the ordinance and once under the statute?" he says: "The cases on this subject cannot be reconciled. Some hold that the same act may be a double offense, one against the state and one against the corporation. Others regard the same act as constituting a single offense, and hold that it can be punished but once, and may be thus punished by whichever party first acquires jurisdiction."

One of the principles stated by Mr. Dillon, as extracted from the authorities, is that "where the act is, in its nature, one which constitutes two offenses, one against the state and one against the municipal government, the latter may be authorized to punish it, though it be also an offense under the state law; but the legislative intention that this may be done should be manifest and unmistakable, or the power in the corporation should be held not to exist."

Among the powers specially conferred by the legislature upon the municipal authorities of towns and cities in this state is the power "to

prevent and suppress riots, routs, affrays, noises, disturbances, disorderly assemblies in any public or private place:" Gen. Stats., sec. 3312, subd. 42; and the mode of enforcing ordinances of such municipal corporations in this state appears to be in form a civil action rather than a strictly criminal proceeding: Gen. Stats., secs. 3315, 3317. So that this case is fairly brought within at least two of the distinctive classes under the rule hereinbefore mentioned, which makes the one act constitute two offenses, punishable by different jurisdictional authorities, and under different modes of procedure: See 1 Dillon on Mun. Corp., 3d ed., secs. 367, 368, 409, 410, and note 1 to section 368, wherein the authorities on the subject are collected.

In treating of the constitutional question involved, Mr. Cooley remarks that although the decisions are not uniform, yet the clear weight of authorities is "that the same act may constitute an offense both against the state and the municipal corporations, and both may punish it without violation of any constitutional principle:" Const. Lim. 199.

Upon the second question counsel for plaintiff in error contends that after sustaining a demurrer to a plea of former conviction the proper order is that the defendant answer over; that in this case the plaintiff in error should have been allowed his plea of not guilty and been put to trial, and in support of this view counsel cites the case of Fulkner v. State, 3 Heisk. 33; but we find that the decision in that case was based on a statute which provided that a defendant entering a plea of former conviction should not be thereby debarred the right to enter or rely on any other or as many other pleas as would be a good defense to the indictment; and it may be presumed that such statute was intended to change the practice at common law in such cases. Counsel also cite Yundt v. People, 65 Ill. 373; and Hoskins v. People, 84 Id. 87. Neither of these cases are in point upon this question, since they go only to the doctrine that in indictments for crime a trial cannot be had without an issue made by plea.

On the other hand, there is ample authority to support the practice pursued by the court below in cases of misdemeanors. This practice is based on the ground that where the plan is held not good it is to be regarded the same as a plea of guilty.

The defendant, by his plea, admits the commission of the offense as charged, but pleads that he has already been punished for it. This plea being adjudged untrue upon the facts stated therein, he stands before the court as having pleaded guilty, and judgment is rendered accordingly.

This seems to have been the practice at common law and followed in this country, although a different practice obtains in some states, but usually, we think, under statutes where such plea is treated as a plea in abatement, and not in bar: Archb. Crim. Pr. 356, and note *b*, with the authorities cited; Johnson v. People, 22 Ill. 314; State v. Epps, 4 Sneed, 552; which last is an earlier case than Fulkner v. State, 3 Heisk. 33, before referred to, and before the practice was changed by

the Tennessee statute of 1860, upon which the latter case, decided in 1861, was based.

Another point made by counsel for plaintiff in error is that the court erred in sustaining the demurrer to the plea of former conviction for the reason that the plea averred that the offense for which there had been a former conviction and punishment, was the same offense as the one against which this plea was interposed, and the demurrer of course admitted the fact so pleaded. That upon this admission that the offense of which the accused then stood charged, and the one of which he had pleaded the former conviction, were one and the same act and offense, the plea should have been held good and the demurrer overruled.

That if the prosecution had not intended to admit the truth of the facts thus pleaded he should have replied to the plea instead of demurring thereto; and the case of the Commonwealth v. Bosworth, 113 Mass. 200, is cited as in point.

There the defendant was indicted in the superior court, and pleaded a former acquittal in the municipal court of the town of Taunton.

In delivering the opinion of the court, Chief Justice Gray concludes as follows: "The plea not necessarily showing that the two offenses were distinct, nor that the municipal court had no jurisdiction, the attorney of the commonwealth, if he intended to deny their identity, should have joined issue on the plea and submitted that fact to the determination of a jury. By demurring to the plea, he admitted the truth of the allegation therein that the offense now charged against the defendant was the same of which he had already been acquitted. The judgment of the superior court sustaining the demurrer to the plea of *autrefois acquit* was therefore erroneous, and must be reversed:" Citing 2 Hale P. C. 243; 1 Stark. Crim. Pl., 2d ed., 325, 326; King v. Emden, 9 East, 437; Commonwealth v. Curtis, 11 Pick. 134.

The principal case above cited fails of being in point, for the reason that the plea in that case did not show that the former acquittal was in a proceeding under any ordinance of the town of Taunton, and not under a general statute. For all that is shown, by the plea and by that case, the former acquittal may have been in a court of concurrent criminal jurisdiction (within the sum of fifty dollars) with the court wherein the same was pleaded, and under a like form of procedure. In the case before us the plea averred that the former conviction was had "before one George H. Stewart, who was then and there a justice of the peace, in and for the county of El Paso, aforesaid, and police magistrate of the town of Colorado Springs, state and county aforesaid. . . . . That said conviction was for a violation of section 4 of article 1, section 2 of article 1, and section 1 of article 3, of an ordinance concerning misdemeanors, being one of the ordinances of the said city of Colorado Springs, then and there in full force and effect; that the said conviction was had in the name of the people of the state of Colorado, aforesaid; that the offenses set forth and defined in said sections of said ordinance and the said indictment, and of which the said defend-

ant was and is convicted, as aforesaid, are one and the same in truth and fact, and are identical."

This plea thus showed on its face that the former conviction was had under the ordinances of the town of Colorado Springs, under a jurisdiction and mode of procedure of which the court below was bound to take judicial notice, since the authority of that town, as of all others in the state, is conferred and defined by the general statutes concerning towns and cities, to which we have already referred; and hence, upon the ground that the one act constituted two distinct offenses, the one punishable by the municipal authorities and the other by the state, and under the different forms of procedure provided, as held upon the first question herein discussed, we must also hold that the court did not err in sustaining the demurrer to the plea. In other words, the plea, while averring that the offense of which he had been convicted, and that of which he then stood charged, were one and the same offense, it set forth facts from which it appeared that they were legally two distinct and different offenses.

The judgment of the court below is therefore affirmed.

Judgment affirmed.

Mr. Justice HELM, having presided as district judge of the court below in the hearing and rendition of judgment in this case, took no part in this decision.

ONCE IN JEOPARDY, WHAT CONSTITUTES: See Roberts v. State, 58 Am. Dec. 528, and note, in which this subject is discussed at length. An acquittal or conviction of an assault and battery is no bar to a subsequent prosecution for kidnaping, although the two offenses were committed by the same act: State v. Stewart, 3 West Coast Rep. 229.

A plea of once in jeopardy cannot be sustained, if the former information failed to charge any crime: People v. Clark, 6 Id. 641.

RAY *v.* RAYNOLDS.

Filed December 18, 1885.

ASSIGNMENT FOR BENEFIT OF CREDITORS—CHANGE OF POSSESSION—LIEN OF ATTACHING CREDITOR WITHOUT NOTICE.—Under section 1523 of the general statutes an assignment of personal property for the benefit of creditors, unless accompanied by an actual and continued change of possession, does not pass the title to the assignee, as against a *bona fide* creditor without notice of the assignment. If, therefore, a creditor, without notice, levies an attachment or execution upon the property, before the assignee has secured possession thereof, he obtains a lien, to which the title of the assignee is subject.

ERROR to the district court of Fremont county. The opinion states the facts.

T. A. McMorris, for the plaintiff in error.

Macon & Hobson, for the defendant in error.

HELM, J. In the month of September, 1882, F. S. & W. J. Hartzell, as partners, were engaged in the business of banking at the town of

Silver Cliff in Custer county, and also at Salida, in Chaffee county. About ten o'clock P. M., on the fourth of said month, the partners, being in Silver Cliff, executed and delivered a deed of assignment conveying all of the partnership property, real and personal, to A. J. Rising, as assignee, for the benefit of the firm creditors; Rising immediately accepted the trust. At the hour of seven o'clock A. M., on the succeeding day, plaintiff in error, being the sheriff of Chaffee county, levied a writ of attachment upon certain personal property of said firm at Salida. Such writ issuing in a suit brought by Russell & Alexander, a partnership creditor of the firm. This property, when thus attached by the sheriff, was in the custody of one Holbrook, who was cashier and agent of the Hartzells, and had full charge of the same, together with their business in Salida at the time; and who was then carrying on such business for them in the usual manner. Holbrook had no notice or knowledge whatever of the assignment or attempted assignment aforesaid by his principal of the property under his control, until five hours subsequent to the levy of the writ of attachment.

Four hours and forty-seven minutes after the levy of said writ, the deed of assignment was filed for record in the office of the clerk and recorder of Chaffee county.

There was no opportunity for a change of possession of the property at Salida, unless the same could have been consummated by telegraph, after the assignment, and before the levy of the writ of attachment; no telegrams were sent, and there is no pretense that the transfer was attempted until some time during the afternoon of the fifth, when Rising had arrived at Salida in person.

There is nothing in the record to show that either Russell & Alexander or the sheriff had, prior to the levy of said writ, any notice or knowledge whatever that the assignment had been made, or even that it was contemplated by the Hartzells.

Within a few days after the fifth of September a judgment was recovered for upwards of nine hundred dollars against the Hartzells in the attachment suit, which was never satisfied.

Some other complications exist, and other facts attending subsequent proceedings were given in evidence below; but, entertaining the view we do of the law, it is unnecessary to repeat them here.

Defendant in error, as the successor in trust to Rising, the assignee, brought his suit in replevin against the sheriff to recover possession of the property attached as aforesaid, and obtained judgment therefor.

To reverse the latter judgment the cause is now pending in this court.

At the time of the foregoing transaction there was no state statute on the subject of assignments for the benefit of creditors that in any way affects the question which we deem decisive upon this review.

A number of the principles governing assignments of personal property, including those made for the benefit of creditors, are analagous to rules which control in the sale of such property. Among these, according to the authorities, is that relating to a delivery of the property

assigned. In order to complete the transaction, and pass the title to the assignee, it is held that there must be such a delivery to, and acceptance by him, as the nature of the personalty conveyed will reasonably admit of: Ward & Co. v. Morrison, 25 Vt. 593, citing 17 Id. 271; Wilson v. Pearson, 20 Ill. 81.

We have no hesitancy in adopting the rule that until this change of possession takes place the title has not passed to the assignee as against a *bona fide* creditor without notice of the assignment proceedings. It will be seen further on that we leave as an open question the rights of such a creditor who is charged with this notice.

If, therefore, a creditor without notice levies an attachment or execution upon the property before the assignee has secured possession thereof, he thereby obtains a lien to which the title of the assignee is subject.

It should be noted in passing that prior to 1885 we had no statute providing for the recording of deeds which convey personal property to a trustee for the benefit of creditors.

It is true that the rule as to immediate delivery is relaxed by some of the authorities; that, in the absence of statute, it is said to be sufficient if such delivery follow the execution of the deed of assignment and acceptance of the trust as soon as practicable. But we take it that this rule must be understood as applying to those cases where, although there has been no change of possession, yet the attaching creditor has knowledge of the *bona fide* assignment proceedings, which have already taken place.

If any doubts existed in our minds as to the correctness of the foregoing conclusion, they would seem to be put at rest by section 1523 of the general statutes, being section 14 of our statute of frauds and perjuries, which provides that "Every sale made by a vendor of goods and chattels in his possession or under his control, and every assignment of goods and chattels, unless the same be accompanied by an immediate delivery, and be followed by an actual and continued change of possession of the thing sold or assigned, shall be presumed to be fraudulent and void as against the creditors of the vendor, or the creditors of the person making such assignment, or subsequent purchasers in good faith, and this presumption shall be conclusive."

It thus appears that in this state, where the assignment is not accompanied by an "immediate delivery," such fact in and of itself constitutes a conclusive presumption of fraud as to creditors of the assignor whose execution or attachment levy precedes the assignee's possession. As stated by another court, in construing a similar provision, "the statute admits of no explanation excusing the delivery:" Woods v. Bugbey, 29 Cal. 466; see also Godchaux v. Mulford, 26 Id. 316. Interpreting this provision with reference to sales, see Goodrich v. Michael, 3 Col. 77; Cook v. Mann, 6 Id. 21; Wilcox v. Jackson, 7 Id. 521; S. C., 4 West Coast Rep. 326.

We do not construe the foregoing section fully; we only consider the assignment feature thereof with reference to the facts disclosed in

the case at bar And it is, therefore, sufficient for us to say that, however the conclusion may be, where the creditor has notice of the unfinished assignment proceedings, in cases like the one before us, where he procures his attachment levy without such notice, he obtains a lien which takes precedence over the title of the assignee.

But we are referred by counsel for defendant in error to section 1529 of the general statutes, being section 20 of the act mentioned; it reads as follows: "The question of fraudulent intent, in all cases arising under the provisions of this title, shall be deemed a question of fact, and not of law," etc. Counsel claims that, by virtue of the latter provision, the fraud recognized in the former is made a question of fact. But, as we have already suggested, the language of section 14 renders the presumption of fraud in the absence of a delivery, there being intervening rights, conclusive. Such presumption thereby becomes a presumption of law. Section 20 unquestionably refers to other provisions of the act, which pronounce certain transactions made with a fraudulent intent void, and does not in any manner affect or modify the conclusive presumption of law declared by section 14.

Taking this view of the law, it follows that we must reverse the judgment. And such legal conclusion being decisive of this case, we deem it unnecessary to prolong the opinion by a discussion of the remaining questions presented.

The judgment is reversed and the cause remanded.

SALE, UNACCOMPANIED BY CHANGE OF POSSESSION, FRAUDULENT AS TO CREDITORS: See Barton v. Brown, 8 West Coast Rep. 169; Gill v. Frank, Id. 413; Lewin v. Hopping, 7 Id. 576; Bell v. McClellan, Id. 259; James v. Fulkerth, Id. 387; Goldstein v. Nunan, 6 Id. 132; O'Gara v. Lowry, 5 Id. 417; Comaita v. Kyle, Id. 435.

PEOPLE EX REL. SEELEY v. HALL, TREASURER OF SUMMIT COUNTY. PEOPLE EX REL. SEELEY v. MAY, TREASURER OF LAKE COUNTY.

Filed December 24, 1885.

CONSTITUTIONAL LAW—SUBJECT OF ACT NOT EXPRESSED IN TITLE—COUNTY WARRANTS.—The provisions of the act of 1885, relating to the purchase of outstanding warrants at their market value, setting aside for a special purpose twenty-five per cent of funds in the treasury, advertising for sealed proposals of sale, and otherwise providing for the disbursement of funds in the county treasury are not germane to the subject expressed in the title to the act entitled "An act to provide for the payment of county and road taxes in coin, and to repeal all laws in conflict therewith." Consequently, such provisions are in conflict with section 21, article 5, of the constitution. The unconstitutionality of such provisions does not invalidate the other portions of the act which are germane to the subject expressed in its title.

THE SAME—IMPAIRING OBLIGATION OF CONTRACTS—CONTRACTS BETWEEN MUNICIPALITY AND INDIVIDUAL.—The provision of the United States constitution, prohibiting a state from passing any law impairing the obligation of contracts, applies to a contract between the people acting in a municipal capacity, on the one hand, and a private individual or corporation, on the other.

THE SAME—RECEIVABILITY OF COUNTY WARRANTS FOR TAXES—LEGISLATURE CANNOT IMPAIR.—Prior to the act of 1885 the general statutes provided that county warrants

should be receivable by the treasurer for ordinary county taxes. *Held*, that the right to have such warrants, issued prior to the act of 1885, received in payment of taxes, formed part of the contract evidenced by the same, and that the legislature could not, by subsequent statute, deprive the party to whom the warrant was issued, or his assignee, of such right. To do so would be to impair the obligation of the contract.

THE SAME—WARRANT FOR WITNESS FEES IN CRIMINAL CASES.—A warrant for fees due for services rendered in attendance upon court by the payee as a witness in a criminal case, issued prior to the act of 1885, in pursuance of the statute authorizing the payment of fees to witnesses in such cases, is the evidence of a valid contract between the payee and the county, the obligation of which the legislature cannot impair by depriving it of its receivability for taxes.

THE SAME—STATUTES AUTHORIZING WARRANTS TO BE RECEIVED FOR TAXES ARE CONSTITUTIONAL.—The statutes authorizing the receipt of county warrants in payment of county taxes, are not unconstitutional; they are not in conflict either with section 7 of article 10 of the constitution, which prohibits the general assembly from imposing taxes for municipal purposes, or with section 28 of article 5, which deprives it of the power to exchange, transfer, release, postpone, or in any way diminish the liability or obligation of a person to a municipal corporation; or with section 11 of article 2, prohibiting it from granting any irrevocable immunity.

ORIGINAL suit for injunction and proceeding for *mandamus*. The opinion states the facts.

Teller & Orahood and *Markham & Dillon*, for the plaintiff.

Daniel E. Parks and *H. B. Johnson*, for the defendants.

HELM, J. These causes are both against county treasurers. The former is instituted for the purpose of enjoining the doing of certain acts, threatened by the treasurer of Summit county. The latter is a proceeding to compel the performance of a certain act by the treasurer of Lake county. Both arise under the same statute, and will be disposed of in a single opinion. This statute is an act of the fifth general assembly on the subject of revenue: Sess. Laws 1885, p. 315. We are to consider the cases as upon a general demurrer to the complaint and petition, respectively; in the latter the demurrer also challenging the sufficiency of the alternative writ.

The code—section 342—seems to provide for respondents raising questions of law in *mandamus* proceedings, by answer instead of demurrer. But as no objection is here interposed we shall not find fault with the method pursued; it is in harmony with the practice prevailing in other civil actions.

Two questions are fairly presented for adjudication: 1. Is that part of the act, including the provisos of section 1 and all of section 2, void, because inimical to the constitution? and 2. Can the remainder thereof be construed as prohibiting the receipt for taxes, of county warrants issued prior to July 6, 1885, when the act became a law?

1. The specific objection to which our attention is directed under the first question above stated is that the portion of the act designated therein, relates to a subject in no way mentioned or covered by the title; and therefore, that it is in conflict with section 21, article 5, of the constitution. Other exceptions are taken to the provisions in question but inasmuch as we deem this one decisive, they will not be discussed.

The title of the act is as follows: "An act to provide for the pay-

ment of county and road taxes in cash, and to repeal all laws in conflict therewith."

The first three lines of section 1 declare that "all property taxes levied for county purposes and for road purposes, together with all penalties and costs thereon, shall be payable in cash only." The third and last section specifically repeals two existing provisions which authorized the payment of such taxes in county warrants, and then concludes with the usual general clause repealing inconsistent acts and parts of acts.

The foregoing are the only portions of the statute which can possibly be considered as covered by the title. The remainder thereof treats of subjects wholly disconnected from that of the payment of county and road taxes in cash.

No learning or ingenuity can satisfactorily demonstrate that clauses providing for the disbursement of funds in the treasury, are embraced within a title which is expressly confined to the collection of such funds. It requires no argument to show that provisions relating to the purchase of outstanding warrants at their market value, setting aside for a special purpose twenty-five per cent of funds in the treasury, advertising for sealed propositions of sale from the holders of warrants, canvassing such bids by the county commissioners, and the like, are not germane to the subject mentioned.

This conclusion, however, does not necessarily render void the portion of section 1 above quoted. It and the repealing clauses are clearly, as already observed, within the purpose expressed in the title. They do not in any way depend upon the other parts of the act, and are complete in and of themselves. In view of the latter part of the constitutional provision referred to, as well as under a familiar rule of statutory construction, it is our duty to hold that while all the provisos of section 1 and all of section 2 are void, the remainder of the act is perfectly valid.

2. The second question presented is not so easily answered.

Prior to the adoption of the act under consideration, it was provided by statute that county-warrants should be receivable by the treasurer for ordinary county taxes. And it is contended that the provision requiring all property taxes levied for county purposes to be paid in cash only, cannot be construed as inhibiting the payment of such taxes with orders or warrants issued prior to the taking effect thereof. Counsel for petitioner argue that the statute making such warrants a legal tender for county taxes became a part of the contract represented by them; and that a construction of the act of 1885 which would take from them this quality or attribute would, in effect, impair the obligations of the contract, and therefore be within a familiar inhibition of both the federal and state constitutions.

To meet this objection, counsel for respondent present and ably argue three propositions. They contend: 1. That the framers of the federal constitution in prohibiting the passage by a state of laws impairing the obligation of contracts, referred only to agreements existing between

individuals; that it is error to extend such constitutional provisions to contracts between municipal corporations and private parties; 2. They insist that there is in this case no contract to be impaired; and 3. They assert that the statutes authorizing county orders or warrants to be used in payment of taxes were themselves in conflict with plain declarations of our state constitution, and therefore void.

1. The legality as well as the propriety of applying the constitutional provision in question to contracts between a municipal corporation and a private party are not undisputed. There are distinguished jurors and eminent essayists who think with counsel for respondent, that only contracts between private individuals were intended by the framers of that instrument to be reached by this inhibition. But the supreme court of the United States in a long line of decisions have adhered, though not unanimously, to the contrary doctrine, which was first announced in the Dartmouth College case.

These decisions may, perhaps, be founded upon a mistaken view concerning the intent of the constitution-makers, and the principle announced in them may possibly entail pernicious consequences. But, until that august tribunal shall have retraced its footsteps, the conclusion in question will be accepted by us. We shall assume, then, as correct the proposition that legislation impairing the obligation of a contract between the people acting in a municipal capacity on the one hand, and a private individual or corporation on the other, may be within the inhibition of the federal constitution.

2. It may seem surprising, but is nevertheless true, that the most serious and difficult question presented in nearly all of the cases upon the subject before us was as to whether or not a valid contract existed; and counsel have resolved that this case shall be no exception to the rule. We therefore proceed to consider the inquiry, Is there here a contract to be impaired? Under the law, no authority whatever exists for issuing county orders or warrants as loans or gifts, or in recognition of anything save a valid and binding debt or obligation. The consideration of this debt must be services rendered, or materials furnished, or other benefit received by the county. The fact that the debt is due and the obligation to pay it exists when the warrant issues is a matter of no importance.

The warrant is itself not the debt nor the contract, but the evidence thereof. The obligation would exist without the warrant. But, for convenience in the management of county affairs, it is deemed better to have such debt or obligation evidenced by the writing termed an order or warrant.

As already suggested, however, prior to 1885 it was expressly declared by law that such order or warrant should be received in payment of county taxes. Of this right, it must be presumed, persons dealing with the county had knowledge. It was, therefore, in effect, as though the county had said to A: "You do this work, or furnish these materials, and I will give you one hundred dollars; when the debt accrues I will issue and deliver to you a written order upon myself

evidencing the same; this order, if not sooner paid in money, you may at the proper time use to liquidate a corresponding amount of the debt you owe me in taxes." A accepts the proposition and performs the work or furnishes the materials. The fact that he can pay his taxes with the warrant received is the principal inducement leading him to perform the work or to part with his property; it constitutes by far the most important part of the consideration for his acceptance of the proposition.

Have we not here every element of a binding contract? Parties capable of contracting, a legal subject-matter, a plain proposition made and accepted, and ample consideration moving from both sides. Upon what principle would we be justified in declaring that the right conferred by law to use the warrant or the debt which it represents, in discharge of a claim for taxes, is not of the very essence of the contract? Without this element A would never have accepted the proposition; he would not have performed the labor or parted with his property.

It is contended, however, that a general law is never a contract. This declaration may be true. It is, nevertheless, also true that sometimes, when conditions have been accepted and acts have been performed, or valuables parted with thereunder, such law a constitutes a part of the contract or is inseparably connected with the obligation thereof: New Jersey v. Yard, 95 U. S. 104; New Orleans v. City Hotel, 28 La. Ann. 423; Cooley's Const. Lim., 5th ed., 346; Bush v. Shipman, 4 Scam. 186; Ogden v. Saunders, 12 Wheat. 132.

There is no analogy whatever between statutes authorizing warrants to be received for taxes, and the ordinary laws exempting property from taxation or from sale under execution. The forbearance to levy taxes is usually a privilege extended without any consideration whatever, and the exemption from attachment or execution is a gratuitous favor, given solely for the advantage of the individual. While on the other hand, as already shown, these warrants can only issue where the municipality has received material benefit, and where there is such a debt or obligation as in and of itself constitutes a legal liability.

It is also to be observed that the provision authorizing warrants to be received in payment of taxes was unquestionably enacted more for the benefit of the county than for that of the individual. The legislature in its wisdom assumed that clothing warrants with this attribute would give them an increased and stable value, and thus advantage would accrue therefrom to the county. It matters not that subsequent experience may have demonstrated to this body the fact that the benefits are more than offset by the evils produced.

But an effort is made to disclose a distinction between the particular warrant involved in the *mandamus* proceeding before us, and other county warrants in general. It is said that this warrant represents fees due for services rendered in attendance upon court by the payee as a witness in a criminal case. We are told that the state has power to coerce the rendering of this service for nothing; that it is a duty

which the individual owes to the public, and for which he is not necessarily entitled to compensation. Assuming these propositions to be true, an effort is made to show that the statute authorizing payment of fees is similar, so far as this question is concerned, to the exemption statutes above mentioned. That since the state has a right to demand these services for nothing, it is just the same as though the legislature ordained a gift to the witness, and the right to revoke such gift cannot be questioned.

It would be disastrous to the public weal were we to recognize the doctrine counsel contend for. The logical result of their proposition is that notwithstanding the statutes providing for these fees, the county may repudiate every warrant issued to witnesses for their services in criminal causes. The propriety of allowing compensation from the public treasury in such cases has been long and generally recognized. That it is a necessity in the due administration of public justice, scarcely admits of argument.

The proceeding or transaction possesses peculiar characteristics; it is wholly unlike an ordinary gift *inter vivos;* it bears but slight resemblance to a bounty offered or an exemption allowed from sale or taxation. While the state may compel the rendering gratuitously of such services, it has not seen fit so to do; on the contrary, it has offered an inducement in the guise of a promise; it has said to the witness: "If you will respond when properly requested so to do and give your testimony, the county, in whose behalf I have authority to speak, will pay you a certain sum of money." Relying upon this promise, the witness voluntarily appears, pays his expenses, and gives his time and his services; thereupon, in recognition of the contract, performance thereof by the witness, and its supposed liability in connection therewith, the county executes and delivers to him an order for payment upon its treasurer; were any acceptance by this officer needed, it is evidenced by his written indorsement: "Presented for payment [date], no funds; warrant draws interest from this day at ten per cent per annum. A. B., Treasurer." On the surface, this transaction contains every element of a valid and binding contract. It is only when we go behind the transaction itself, and also behind the legislation by which it is authorized, that we discover the supposed imperfection. To repudiate the promise after having received the services rendered in contemplation thereof, would be an act of bad faith deserving of the severest censure. The contract is wholly executed so far as the witness is concerned; the county also has executed the same to the extent of issuing its order for the money due; the transaction is not *ultra vires;* the only blemish is that had one of the contracting parties chosen, it might have compelled the other to render gratuitously the service for which it has promised to pay. Under all the circumstances, we shall decline to distinguish between the instrument before us and other county warrants so far as the consideration therefor is concerned. If doubts upon the correctness of this view existed, a regard for the vast public interests involved would impel us to resolve them as above announced.

We shall assume, therefore, that the warrant under consideration represents a valid contract, and it needs no argument to show that the act of 1885, if applied thereto, would materially and injuriously affect the same. It would operate to release one of the parties from its obligation. The contract of the county was to receive this warrant in payment of taxes. The statute which says that it shall not be so received, and thus entirely discharges the county of its duty to comply with its contract, most assuredly impairs the obligation thereof. It is a negation of the law which bound the county to perform its undertaking: Sturgis v. Crowninshield, 4 Wheat. 122.

It is worthy of note in passing that the organic law of the state upon this subject is even stronger than the federal constitution. The latter simply prohibits states from passing laws "impairing the obligation of contracts;" the former forbids the enactment of a law "impairing the obligation of contracts or retroactive in its operation." We are not permitted to say that these phrases are synonymous in meaning; and it follows that the latter was intended to reach cases not covered by the former.

We do not underestimate the importance of the subject before us. It is fully understood that we are dealing indirectly with the taxing power of the state; and that only upon the most cogent reasons should this legislative prerogative, even as to the manner of its exercise, be in the least interfered with by us. We subscribe most cordially to the following declarations on the subject by the supreme court of the United States, made in Tucker v. Ferguson, 22 Wall. 527: "The taxing power is vital to the functions of government. It helps to sustain the social compact, and to give it efficacy. It is intended to promote the general welfare. It reaches the interests of every member of the community. It may be restrained by contract in special cases for the public good, where such contracts are not forbidden. But the contract must be shown to exist. There is no presumption in its favor. Every reasonable doubt should be resolved against it. Where it exists it is to be rigidly scrutinized, and never permitted to extend, either in scope or duration, beyond what the terms of the concession clearly require. It is in derogation of public right, and narrows a trust created for the good of all."

But it must be observed that, in the first place, the contract here considered is not strictly in restraint of the taxing power, though it influences the exercise thereof; secondly, that this contract is made out beyond a reasonable doubt. It hardly seems necessary to suggest that we do not hold the legislative acts authorizing the receipt of warrants in payment of taxes irrepealable. We fully recognize the beneficent doctrine that one legislature cannot, in general, tie the hands of its successors. Our position is simply that a provision contained in the statute adopted by one legislature may, when accepted and acted upon by a private citizen or corporation, result in a contract which succeeding legislatures are powerless to repudiate.

Again: it is said that petitioner in this case, being assignee of the

instrument represents a valid contract, yet it is not negotiable.

While there is not entire unanimity on the subject, the principle is well established that these instruments, when containing words of negotiability, are assignable. In such case the title and ownership pass to the assignee, and he may bring an action thereon. Several of the states, including Colorado, permit him to sue in his own name and for his own benefit; and the presence or absence of negotiable words in no manner affects his rights in the premises. But the doctrine is also equally well recognized that warrants do not possess all the usual attributes of negotiable paper; the ownership of the assignee is never discharged of defenses which might have been made against the original payee. Unlike bills of exchange and promissory notes negotiated before maturity, county warrants are liable, in the hands of all persons, to every defense which the county might have interposed in an action brought by the original payee: Wall v. County, 103 U. S. 74; Dillon on Mun. Corp., 3d ed., sec. 487.

3. In support of the argument that the statutes authorizing the receipt of warrants in payment of county taxes were themselves unconstitutional and void, counsel advance three distinct propositions: 1. That they are in conflict with section 7, article 10, which prohibits the general assembly's imposing taxes for municipal purposes, and authorizes that body to invest the corporate authorities with power to assess and collect the same; 2. That they are inconsistent with section 38, article 5, of the constitution, depriving the general assembly of the power to exchange, transfer, release, postpone, or in any way diminish the liability or obligation of a person to a municipal corporation; 3. That they are an infringement of section 11, article 2, providing that the general assembly shall not grant any irrevocable immunity.

Except as limited or controlled by constitutional provisions, the general assembly is omnipotent in relation to municipal corporations within the state; it calls them into being and endows them with whatever powers and privileges they possess; if in its judgment advisable, their existence even may at any time be absolutely terminated; in these and other particulars it bows only to the superior behests of the people expressed in their organic law. The object in creating these corporations is to better promote the interests of the people in localities, than would be possible without them; and the action of the general assembly in the premises must be understood as intended to advance the public good. It may fairly be said that it is a right possessed by this body to adopt such legislation in relation to the making of municipal contracts as will promote the public weal, while preserving the honor and good faith of the corporate body.

The legislation now objected to had reference to certain contracts made by counties. It simply provided that when counties entered into contracts through which material benefits were obtained for themselves, and thereby became indebted to other parties, they should act

with the understanding that as an element of such contracts they were to receive in payment of taxes the warrants tendered by them in lieu of cash upon their indebtedness. We look in vain to the constitutional provisions cited for anything which directly or indirectly controls the legislative discretion in this matter. By the statutes now under consideration that body imposed no taxes, neither did it deprive the proper county officials of the power to assess and collect the same. No immunity, irrevocable or otherwise, was given. And no liability or obligation was released, postponed, or diminished. Taxes are paid by warrant instead of money, but this was a matter of contract to which the municipal corporation was itself a party; and there is nothing in the constitution, we believe, which prevents the county, the power so to do being conferred by statute, from making a valid contract by which it is stipulated that its warrants shall be a legal tender to it for taxes.

We do not pass upon the question, because it is not before us, as to whether the legislature could inject this element into contracts previously made; and consequently this opinion by no means declares that the county could be compelled to receive for taxes warrants issued prior to the passage of such laws as the statutes in question.

We think, in conclusion, that so much of the act of 1885 as relates to the payment of taxes in cash instead of warrants subsequently issued is constitutional and valid; but that it cannot be so construed as to prohibit the receipt of county warrants in payment of county taxes, which were issued prior to its adoption, and under the statutes repealed. As already indicated, we hold, for the reason above given, that the rest of the act is unconstitutional and void.

It follows, therefore, from these conclusions, that both of the demurrers must be overruled. No further plea being interposed, we are of opinion that a perpetual injunction should issue in the suit against Hall; and it is accordingly so ordered. It is also ordered that respondent in the proceeding against May have time, and until the eighth day of January, A. D. 1886, to controvert by answer matters of fact stated in the alternative writ and petition. In case of failure so to do, the peremptory writ prayed for will issue on the date last above mentioned.

BACHMAN v. PEOPLE.

Filed December 18, 1885.

CRIMINAL LAW—PREPONDERANCE OF EVIDENCE—REASONABLE DOUBT.—A bare preponderance of proof is not sufficient to convict a person of an infamous crime; and if there be no probable hypothesis of guilt consistent, beyond a reasonable doubt, with the facts of the case, the accused must be acquitted.

THE SAME—NEW TRIAL, WHEN GRANTED.—A court of review may award a new trial in criminal cases whenever, in its judgment, a conviction is not warranted by the proof.

THE EVIDENCE REVIEWED AT LENGTH, its character and weight considered, and held not sufficient to support a conviction of grand larceny.

Henry B. O'Reilly, for the plaintiff in error.

T. H. Thomas, attorney-general, for the defendant in error.

BECK, C. J. The defendant below, Frederick Bachman, was indicted for the crime of grand larceny, at the March term, 1884, of the district court of Elbert county. He was tried and convicted at the same term, and sentenced to serve a term of one year and six months in the state penitentiary.

The offense for which the defendant was convicted was that of stealing a heifer from the prosecuting witness, August Ehler, on the fifth day of November, 1883.

Before sentence, the defendant moved the court for a new trial, the principal grounds of the motion being insufficiency of the testimony to sustain the verdict, and newly discovered evidence.

This motion was denied, and exceptions to the ruling taken.

The defendant, Fred. Bachman, and the prosecuting witness, August Ehler, are both prominent and well-to-do citizens of Elbert county. Both are possessed of large stock-ranches, and both have for years been engaged in the raising of cattle and other stock; more than this, they are neighbors, their ranches adjoining, and being separated only by a division fence, constructed of wire. Mr. Ehler's house is three quarters of a mile from this fence in one direction, and the defendant's house one mile therefrom in an opposite direction.

At the time of the alleged larceny the defendant was not residing upon his ranch, but resided with his family at Kiowa, a few miles distant.

On November 5, 1883, defendant was upon his ranch, and drove a red heifer having white color-marks from his pasture into his corral, and butchered her for beef for his own use. Ehler was informed that this was his heifer; the information coming through John Bachman, a nephew of the defendant in his employ. Whereupon Ehler caused the defendant to be arrested and held to bail, and afterwards to be indicted and tried for grand larceny.

Ehler and the defendant had been enemies, according to the testimony of the former, for about eight years, and sharp words had passed between them about a month previous to this occurrence.

This nephew had been in the employ of the defendant ever since his arrival here from Germany, a period of about sixteen months.

He witnessed the defendant driving up the heifer into the corral, also the killing, and obeyed the call of the defendant to bring the team with which he was working, and to drag the heifer up to the skinning-post.

The conviction of the defendant was due largely to the testimony of this nephew, and to a singular circumstance, the happening of which was proved; but there was no proof connecting the defendant therewith. This circumstance was the cutting out from the left side

of the hide, from the shoulder to the tail, a strip six or seven inches wide, which probably contained the brand; also the removal of that part of the hide which covered the head and contained the horns and ears. It is probable also that the portion which had covered the legs below the knees and hocks had likewise been cut off, since they did not appear upon the mutilated pieces.

In addition to all this, the skin had been cut into two pieces, and was found hanging up in the goose-house, an old log building belonging to defendant, which adjoined the corral, and had neither doors nor windows, but openings therefor only, and into which building any passer-by could look or enter at pleasure.

The act of slaughtering the heifer was done openly, and the defendant has never denied the same, nor any circumstances connected therewith, which, in our judgment, has been established by sufficient proof to be contrary to the defendant's version or statement. He has persistently asserted, however, both on and off the witness-stand, that the heifer was his own property; that it bore his brand and ear-mark; that it was born in his pasture and had never been out of it, and that he had full right to kill it as he did, for his own use.

He testified that it was eighteen months old, and that the only brand upon it contained the letters "F. B.," which was his brand; also that the left ear was cropped, which was his ear-mark. He testified that his nephew was using a team working upon a ditch forty or fifty rods distant from the corral when he drove in the heifer, and that after shooting her he called to him to bring the team up and drag the animal up to the skinning-post. In the mean time he had separated the skin along the belly and had skinned and cut off the legs. He had not touched the ears. After the animal was put in position at the post he and his nephew took off the entire hide in one piece, including the skin of the head, neck, and legs. The latter were skinned nearly to the hoof. He hung the hide upon a fence board in the corner of the corral just as it came from the animal. Next morning he went to Kiowa and the nephew went to Bijou. When defendant left the ranch the hide was in the same condition as upon the evening previous. He was not certain which left the ranch first, himself or his nephew. He did not again return to his ranch until the second Sunday after the election, which would be November 18, when he found the hide in the goose-house adjoining the corral, cut up as described by the witnesses.

Defendant says he did not cut up the hide, and don't know who did; he thinks the pieces found are parts of the hide taken from the heifer he killed. His testimony appears to be straightforward, and no attempt at evasion or the making of testimony in his favor is discernible. He produced the mutilated hide upon the trial, and had the fact been proved that defendant had mutilated the same there would remain no reasonable doubt of his guilt, for the brand and ear-marks had evidently been removed in such a manner as to indicate that it had been done to destroy the identity of the hide with that of the animal from which it had been taken.

hung up in the corral on the same evening the animal was killed, and also the next morning, and that it was on both occasions whole, and not mutilated. He says he went to Bijou the morning of the sixth of November, leaving his uncle at the ranch, and when he returned late in the evening his uncle was at Kiowa. Nobody else was on the ranch when he left in the morning, but a herder had come there while he was away. On the morning of the seventh he saw the hide in the goose-house, mutilated as before described. His testimony as to the manner of skinning it off the animal was that the entire hide was taken off in one piece, including the head and the legs to the knees and below the knees. He denied that he assisted in the skinning. He says he knew the animal to be Ehler's, and that it had Ehler's brand, "I. E.," upon it, but he did not see the brand upon the animal before it was skinned, or upon the hide after the same was removed from the animal. At the time he hitched the team to the hind legs to draw the carcass up to the post he noticed the right ear had been cut off, but did not see the ear. He admitted that he had told Christ Vogt that both ears had been cut off at that time, but he was mistaken; only the right ear had been cut off.

It will here be observed that the ear-marks of both Ehler and the defendant were upon the left ear, Ehler's being an "under bit," as he describes it, and the defendant's a cropping of the left ear.

An examination of the testimony given by the witnesses on part of the people shows it all to have been of this uncertain and contradictory character. All statements of fact upon which they agreed, and did not afterwards themselves contradict, may be true, and at the same time consistent with the defendant's innocence, save the positive testimony given by John Bachman on the trial, nearly all of which, however, is rendered unworthy of credit by contradictions by himself on the witness-stand, and by proof of statements made by him on other occasions contradictory to his testimony at the trial. For example, according to the testimony of John Hoffman, a witness called by defendant, John Bachman first declared his belief that the slaughtered animal was Hoffman's cow. The witness Hoffman says he had in his possession a cow belonging to the defendant in the months of October and November, 1883; that he lost her early in November, and was hunting her. Meeting John Bachman a few days after the election of November sixth, the latter told him he believed the defendant had killed his cow. Witness replied that the cow he was hunting belonged to the defendant.

This witness further testified that he, said Hoffman, was then working for defendant, and knew he had not killed a cow, but had killed a heifer. Also that witness had subsequently found the cow he had lost, when John Bachman admitted he was mistaken.

John Bachman says he told Vogt, on the thirteenth day of November, that his uncle had killed Ehler's cow. Vogt communicated this information to Ehler on the eighteenth day of November. Vogt was not a

witness upon the trial, but Ehler's account of that interview is that Vogt called upon him on Sunday, November 18th, and asked about his own cattle which were being herded near by, and being told by Ehler they were all right, he then asked if his (Ehler's) cattle were all right. Ehler replied that he did not know, but was going out to the pasture to see.

This was thirteen days after the heifer had been converted into beef; and if his answer to Vogt was true, he had not then discovered his loss.

In almost the next breath the witness Ehler acknowledges that the latter statement was untrue, for he says he had ascertained, November 17th (which was the day before), that he had lost two animals, a steer and a heifer.

But upon his reply to Vogt that he did not know whether his own cattle were all right, the latter gentleman told him that if he would go down to the defendant's goose-house he would find the hide of one of his animals hanging up there; that defendant's nephew had told him so. Upon Ehler's attention having been called to this inconsistency in his testimony, and being asked why he did not inform Vogt of his loss if he had discovered it the day previous, he gives the following excuse: that defendant and he were in trouble; he knew he could not prove anything, and defendant would proclaim that he (Ehler) accused him of stealing.

This was a novel explanation, especially so in view of the fact that he told three other persons next day that Bachman had stolen his heifer, and took them to the goose-house to see the mutilated hide, as proof thereof. His first visit to the goose-house was about half an hour after receiving the information from Vogt.

He says the hide was cut into two pieces; that the part of the hide the brand was on was missing.

It was cut up from the left shoulder and behind the legs, and circled clear around the brand, a strip five or six inches wide—says the brand on the heifer was five inches wide; the hide was preserved down to the knees only. He further says that he hunted around and found the legs near the spot where the animal had been killed, and that they had not been skinned below the knees; that the front feet were red, the hind feet white. He swears positively that when he saw the two pieces of the hide and the legs he knew it was his heifer that had been killed.

It is a singular fact that nobody else saw these legs. The defendant says he skinned the legs down almost to the feet, and then boiled the legs for the oil and meat they contained. Not one of the three persons taken by Ehler next day to see the evidence of defendant's guilt saw these legs. Ehler says he forgot to show the legs to those witnesses, although it appears from his testimony that the discovery of them, with the familiar red upon the front feet and white upon the hind feet, left no doubt remaining in his mind that it was his heifer the defendant had killed. Benedict Marke, one of these witnesses,

stated, when testifying on the part of the people, that he looked round the corral for the feet and ears, but saw nothing of them, and that Ehler did not tell the parties present that he had seen them the day before.

The same is true of the other two witnesses. Neither of them saw the legs; even the informer, John Bachman, who was mainly instrumental in procuring his uncle's conviction, testified, on the trial, that he remained and worked for defendant ten days after the killing of the heifer, but saw nothing of the legs.

August Ehler is the only witness who testified to the contrary. It would seem, from his testimony, that he saw the legs upon the second visit, when all three of the above-named witnesses were present, for he not only says he forgot to show them to the witnesses, but that he just walked by and saw them, but did not know whether the others saw them or not. Considering the mission upon which Mr. Ehler went on the second day, and his object in taking the three persons with him, it is not a little strange that he should have forgotten to show them these important items of evidence which had proved so conclusive of the defendant's guilt in his own mind.

This witness testified to a minute description of his missing heifer, including age, size, color, and color-marks, from the white spot in the forehead to the color of the brush of the tail, which, he says, was white.

He had twenty-six other animals of the same age, but admitted he could not describe any of them with the same precision. The reason he remembered the description of this one so well was, that it was his best heifer, and was from a cow he had milked the previous summer.

He then admitted he had milked five cows the previous summer, and that this heifer and a calf from another cow were so nearly alike that, although the color-marks were somewhat different, he could only tell to which cow each belonged when he saw them together.

Regarding this description, he stated further that he gave it from his memory of it as a yearling; that he lost his familiarity with the heifer during the previous winter.

In this statement he seems to have overlooked another statement made by him, viz., that he had seen and recognized this heifer eight days before it was killed, and had turned it, with a band of fifteen others of the same age, into his pasture. That was on October twenty-eighth.

If John Bachman tells the truth, this heifer was in his uncle's pasture on the same day Ehler found it with the band upon the creek, and turned the whole band into his pasture. We have seen that Ehler made contradictory statements as to when the discovery was made that he had lost this animal.

One statement was that the discovery was made November 17th, and the other that he know of no loss on November 18th, until he received the information from Christ Vogt.

It would seem, however, that his suspicion that the defendant had

stolen this heifer was considerably in advance of his information or knowledge. On November 7th he noticed that an animal had been drivon through the wires of the partition fence, apparently by a man on horseback, there were tracks of a horse inside, the under wires broken down, indicating the passage of a small animal from his pasture into Bachman's, and hairs were to be seen on the wires. Upon seeing these indications he expressed his suspicion thus: "I suspected defendant had driven that animal through the fence."

With such a suspicion in his mind November 7th it is singular that it was necessary for him to tell Vogt, November 18th, "that he didn't know whether his cattle were all right, but that he would go out to the pasture and see." Another instance of the inconsistency of Ehler's testimony is his answers to to the question whether he had talked with John Bachman before filing the information against the defendant. He answered that he had not, and that the first time he saw him was in the court-house on December 1st.

He afterwards admitted that he saw John Bachman at defendant's ranch on Monday, November 19th, "when he took the three witnesses there to view the mutilated hide, and asked him who killed that heifer, and that he answered "Fred Bachman killed it."

The reckless inconsistency of August Ehler's testimony is only equalled by the contradictory and improbable statements of John Bachman. We have already adverted to the fact that according to the testimony of an unimpeached witness he first reported that the animal killed belonged to John Hoffman, and after that animal had been found he admitted he was mistaken, and afterwards declared it was Ehler's animal that had been butchered.

He said on the trial that the hide was not mutilated when hung up in the corral on the evening of November 5, 1883, and that it remained in the same condition next morning. He stated also that he knew the animal slaughtered to have been Ehler's, and that it bore his brand "I. E." on left side. But he says he did not see either brand or ear-marks at the time of the killing. He brought his team and dragged the heifer up to the post, and saw the hide then and after it was hung up in the corral, both that evening and next morning; and although he was satisfied it was Ehler's heifer, he made no examination of brand or ear-mark. He describes the animal as red, with a white belly; says when Fred commenced to drive her to the corral she was with the herd a quarter of a mile distant from him, and that he recognized the cow that distance; she had been in the pasture eight days; he had seen her every day, had examined her six times, and knew that she belonged to Ehler. He knew when he saw it shot that it was the one he had seen in the pasture with Ehler's brand upon it.

The explanation which he gives for not examining the hide for brand and ear-marks is, that Fred would not have liked it, and he could not examine it without Fred seeing him. He admits he told Vogt that when he came into the corral where Fred was skinning her that both ears had been cut off, but says he was mistaken, that only the right ear had been cut off.

What object defendant could have had in view in cutting off the right ear, when both his own and Ehler's ear-marks was upon the left ear, is not explained.

He says he told Vogt that the bag of the heifer had been cut off, but he was mistaken as to this fact also.

Witnesses sworn on behalf of the defendant testify to what John Bachman had previously sworn to on the preliminary examination before the magistrate, most of which John denies. G. A. Wood, a cattle-raiser, living at Kiowa, says he heard his testimony on that occasion, and he swore he did not know what brand was on the animal, and that he did not know what Ehler's brand was.

George Farian, who had resided in Elbert county since 1864, and who acted as interpreter for John Bachman in the preliminary examination, says that when the witness was testifying about the brand at one time he said he knew it, and at another time he said he did not know it, according to the question. He did not think he described Ehler's brand on that occasion.

This witness being asked on cross-examination the following question: "Did he say he never saw the brand, and didn't know the brand on the animal?" answered, "He didn't say it in the words and manner you do, though it seems to me now that he expressed that." He said "he knew the ear-marks better and knew the animal to be Ehler's." In answer to another question, witness thinks John Bachman said he didn't know whose animal it was.

Rhinehart Mattesins swears he met John Bachman two day after the preliminary examination, when he told the witness that he was not then working for his uncle as he had sent him off because he had testified that he killed Ehler's heifer.

Witness asked him if he had done so, and he answered, "Yes, I had to say so or Fritz Vogt would send me to the penitentiary."

Upon a review of the whole testimony and the circumstances in evidence, taking into account the situation of the parties, prosecuting witness and defendant, with regard to character, business experience and success, their social relations, the manner in which this charge against the defendant originated, and the contradictory and improbable character of the testimony produced to support the same, we are of the opinion that the proof is wholly insufficient to sustain the verdict and judgment.

It is wholly improbable that a man of the business ability and experience of defendant would, if guilty, so mutilate a hide as to destroy its value for the purpose of avoiding detection, and then hang the worthless fragments in a conspicuous place where every passer-by could see and examine them. Especially when the object of the mutilation was apparent upon the slightest examination.

The proof that the heifer killed by Mr. Bachman was the property of Mr. Ehler is equally unsatisfactory.

A feud of eight years' standing had existed between Ehler and the defendant. Ehler was ready to suspect the defendant of driving off his stock several days before he learned from John Bachman, through

Vogt, that he had lost an animal. His *animus* and prejudice, as well as the inconsistency of his testimony, appears throughout the case.

Admitting that he had lost a heifer, his testimony that the defendant had taken or killed it is anything but positive or satisfactory. The fragments of the hide found in the goose-house were of such an ordinary description that the same might have been taken from animals in any herd.

His statement of finding the legs unskinned, and that he recognized them, is remarkable, since neither John Bachman, the informer, who lived on the premises, nor either of the three witness taken by Ehler to see the proof of defendant's guilt, ever saw them after the animal had been killed. That Ehler forgot to show these proofs to his witnesses, under the circumstances, is also remarkable.

This court and other courts have often said, that where the evidence is conflicting, and the verdict is not manifestly against the weight of evidence, it will not be disturbed. Also that when there is a direct conflict in the evidence, it is the province of the jury to determine to whom credit should be given.

There is a serious conflict in the evidence here, but it is principally between the witnesses on the part of the people, and between the several statements of each of the two witnesses upon whose testimony the defendant was convicted, John Bachman and August Ehler. The rules referred to do not contemplate a conflict of this character, but between the testimony of witnesses produced for the respective parties litigant.

We also regard the verdict as manifestly against the weight of the evidence when analyzed and its weight ascertained.

There are ,however, other rules to be considered, when applicable, as that a bare preponderance of proof is not sufficient to convict one of an infamous crime; that if there be no probable hypothesis of guilt consistent beyond a reasonable doubt with the facts of the case, the accused must be acquitted.

Also that a court of review may award a new trial in criminal cases whenever in its judgment a conviction is not warranted by the proof.

It is also to be remembered that the law presumes the character of the defendant to be good; his course throughout this whole prosecution appears to conform to this presumption.

Concerning the mutilation of the hide, it is certainly quite as probable, from a review of the whole case as presented by the record before us, that it was the act of a conspirator as that the defendant committed so silly an act as this was shown to be.

Mr. Wharton says: "The fact of the commission of the offense must necessarily be the foundation of every criminal suit; and until that fact is proved most dangerous would it be to convict;" to which he cites: State v. Davidson, 30 Vt. 377; Smith v. Commonwealth, 21 Gratt. 809; State v. Keeler, 28 Iowa, 553; People v. Bennett, 49 N. Y. 137.

In consideration of the peculiar features of this case, at least one of the affidavits filed in support of the motion for a new trial below on

the ground of newly discovered evidence would seem to be in point, and should have been considered favorably.

The affidavit of George T. Kathrews alleged that he visited defendant's ranch early in November hunting lost stock, and that he saw a green hide hanging up in the corral; that he examined it, and it bore the brand "F. B." upon it (Bachman's brand), and no other marks; that he noticed that it was not mutilated at this time.

There were other affidavits filed concerning newly discovered evidence that we do not deem necessary to refer to. Defendant alleged in his affidavit upon this motion that he knew nothing of the visit of Kathrews to his ranch at the time stated in his affidavit, nor of the information possessed by him until after the trial.

This affidavit bears directly upon a point not by any means satisfactorily established by the prosecution. It is therefore not without weight in passing upon the regularity of the proceedings.

We regard the evidence insufficient to sustain the verdict and judgment, and it appearing upon inspection of the entire record that the conviction and sentence are not warranted, the judgment is reversed. and the cause remanded for further proceedings.

SUPREME COURT CF NEVADA.

THOMPSON *v.* RENO SAVINGS BANK ET AL.

Filed December 31, 1885.

CORPORATIONS—STOCKHOLDER'S LIABILITY FOR UNPAID SUBSCRIPTIONS—PRESENTATION OF CLAIM.—The unpaid capital stock of a corporation is regarded in equity as a trust fund, held in reserve by the stockholders for the benefit of creditors; and suits to establish and enforce the trust are maintainable against the representatives of deceased stockholders upon the theory that the decedent held money equal to the amount of his unpaid subscription in trust for the creditors, and that the fund, although incapable of identification, has passed into the hands of the executor or administrator. Such a fund is no part of the estate of the deceased person. No necessity, therefore, exists for the presentation of any demand against the personal representative before bringing suit.

VARIANCE—EVIDENCE SUSTAINED BY ANSWER.—A variance between the facts proved and those alleged in the complaint is immaterial, if the answer set forth the facts as they appeared in evidence.

CREDITOR'S SUIT—REMEDY BY ASSESSMENT.—A judgment creditor of a corporation, who has exhausted his remedy at law, may maintain a suit in equity to subject the unpaid subscriptions of the stockholders to the satisfaction of his claim. He is not confined to a remedy by assessment, to be levied by the trustees upon all the stockholders.

THE DECREE ENTERED IN THIS ACTION reviewed, and held unobjectionable.

APPEAL from a judgment of the seventh judicial district court, Washoe county, entered in favor of the plaintiff. The opinion states the facts.

Clarke and King, for the appellants.

J. F. Alexander, for the respondent.

BELKNAP, C. J. This is a suit in equity to recover the amount of unpaid subscriptions to the capital stock of the Reno Savings Bank.

Two of the defendants are representatives of deceased persons. They object to the proceedings because of the admitted failure of respondent to comply with the requirements of the probate law in the matter of the presentation for allowance of the demands sued upon.

The law requires, Comp. L., sec. 611, "If a claim be not presented within ten months after the first publication of notice it shall be barred forever," unless certain exceptions exist immaterial here. Again, section 618: "No holder of any claim against an estate shall maintain any action thereon unless the claim shall have been first presented to the executor or administrator." Courts of equity uniformly regard the unpaid capital stock of a corporation as a trust fund, held in reserve by the stockholders for the benefit of the creditors. The stockholders are trustees of the creditors, and suits to establish and enforce the trust are maintained against the representatives of deceased persons, upon the theory that the decedent held money equal to the amount of his unpaid subscription in trust for the creditors, and that the fund, although incapable of identification, has passed into the hands of the executor or administrator. Such a fund is properly no part of the estate of a deceased person. The deceased stockholders were trustees, and not debtors of the bank's creditors. No necessity, therefore, existed for the presentation of any demand before commencing suit: Gunter v. Janes, 9 Cal. 643.

The bill proceeds upon the ground of an indebtedness arising out of a subscription by the defendants to the capital stock. The testimony shows that no express agreement was made to take any portion of the capital stock of the bank, but that the defendants, L. L. Crockett, James H. Kinkead, R. H. Crocker, deceased, and others, deposited thirty thousand dollars with the bank as its business capital, and agreed among themselves and the bank that they should not be liable for the payment of any further amount of money for the purposes of the bank.

Upon these facts it is said that a fatal variance exists between the pleadings and the proof. The agreement established was an implied rather than an express agreement. The variance was immaterial, and could not have misled the defense: Smith v. Lippincott, 49 Barb. 398. Moreover, the decree may be sustained upon the ground that the answers of the defendants set forth, by way of defense, the facts above stated as having been introduced in evidence. The relief granted is, therefore, within the issue made and litigated: Comp. L., sec. 1211.

Objection is also made to the remedy awarded. It is said that if plaintiff is entitled to any relief, it is by assessment to be levied by the trustees upon all of the stockholders, as contemplated by the by-laws of the bank.

The authorities are uniformely opposed to this suggestion. In Hatch v. Dana, 101 U. S. 215, the court said: "In the English courts a *mandamus* is sometimes awarded to compel the directors to make the necessary calls. . . . But this remedy can avail only where there are directors. The remedy in equity is more complete, and it is well recognized: Ward v. Griswoldville M. Co., 16 Conn. 593. In such cases

it is nowhere held, so far as we know, that a formal call must be made before a bill can be filed. Indeed the filing of a bill is equivalent to a call." And in Dalton etc. R. R. Co. v. McDaniel, 56 Ga. 191, upon a similar objection, it was ruled that "principle and sound reason accord with authority that equity will grant relief in all such cases." But an assessment upon the stockholders would be wholly inadequate in the present case.

The answer avers that the bank is indebted to a great number of persons in large amounts. Each creditor was entitled to participate ratably with the plaintiff in the fund, and no creditor could be allowed to satisfy his debt to the exclusion of another. If the fund fell short of the amount of the debts of the bank, a court of law would be incapable of adjusting the rights of the creditors. This can be done in equity only.

Further objection is made to the amount of money required to be paid by the defendants under the decree. Plaintiff recovered a judgment at law against the bank for the sum of thirty-one thousand five hundred and twenty-eight dollars and thirty-eight cents, with interest and costs. The aggregate amount of the judgments against the defendants in the present suit is thirty-nine thousand nine hundred dollars, and other judgments have been rendered in kindred suits aggregating nineteen thousand two hundred dollars, etc. It is said that the effect of the decree is to require the defendants to pay a sum of money to the plaintiff largely in excess of the amount due him from the bank. An examination of the decree will show that the money to be obtained under it is to be paid into the district court as a trust fund for the benefit of the creditors of the bank, to be distributed proportionately among them; that the amounts respectively received are to be credited upon the indebtedness of the bank to each creditor, and the liability of the bank therein discharged to the amount such creditor may receive.

The decree is unobjectionable. The district court could not have anticipated payments under the decrees rendered in favor of the plaintiff in the other suits, and no suggestion of that nature was made to it. This, and the other suits, were brought for the purpose of collecting a fund to be applied ratably to the satisfaction of judgments at law recovered against the bank, and duly presented to the court below by the creditor, for participation. The decrees in all of these suits are framed with this object in view.

The record contains many exceptions to the rulings of the court in admitting and excluding evidence. We shall not consider them, because, upon the facts heretofore referred to as contained in the answer in connection with the testimony of defendant James H. Kinkead, fixing the proportionate liability of each of the defendants, the decree is, in any event, correct.

The rulings in Thompson v. Lake, 6 West Coast Rep. 533, and 7 Id. 495, are decisive of the other points.

The decree and order of the district court are affirmed.

SUPREME COURT OF OREGON.

SIMPSON *v.* CARSON.

October Term, 1884.

CONDITIONAL DELIVERY OF WRITTEN CONTRACT—PAROL EVIDENCE.—Parol evidence is admissible to show that the delivery of a written contract, not under seal, was made on conditions.

AGENCY—POWER COUPLED WITH INTEREST.—An agency to sell real estate and to receive the proceeds thereof, above a certain amount, is not a power coupled with an interest.

TENDER AND PAYMENT INTO COURT ONLY ADMITS the cause of action as to the sum tendered. It does not conclude the defendant as to any defense he may have against a further recovery.

APPEAL from Multnomah county. The opinion states the facts.

John M. Gearin and *W. T. Burney*, for the appellants.

Northrup & Gilbert, for the respondent.

By COURT. This is an action on a special contract to recover commissions on the sale of real property. The contract is in writing, signed by the owner of the property, and recites as the consideration, "valuable services performed and to be performed." It bears date November 8, 1882, and gives the appellants "the exclusive sale" of the property for one hundred and eighty-five days, and afterward until five days' notice by the respondent of her intention to terminate the agreement. It also binds her to make conveyance in case of sale by the appellants, and to pay them all over fifteen thousand five hundred dollars, net, realized upon the sale of the property. The appellants allege performance on their part, and the refusal of the respondent to execute a conveyance and accept the stipulated price, twenty thousand dollars, or to pay them four thousand five hundred dollars due them as commissions under their contract with her. The defense is:

1. A denial of the contract;

2. Fraud on the part of appellants in obtaining it;

3. A parol agreement at the time of delivery of the written contract that it should not become operative without the assent of J. C. Carson, the respondent's husband, which was not obtained;

4. A rescission of the contract by the respondent before the sale by the appellants, and a tender and payment into court of forty dollars, as the reasonable value of the appellants' services prior to such rescission.

These matters were all put in issue and submitted to a jury, who found a verdict of forty dollars for the appellants. Judgment was entered accordingly in their favor on respondent's motion. The errors assigned on the appeal arise wholly upon instructions given or refused at the trial.

1. The court below charged the jury in effect that the parol agreement alleged in the defense, if established by the evidence, would bar any recovery beyond the forty dollars tendered and paid into court, unless the assent of the respondent's husband had been obtained. The

written contract sued on is not under seal, and even at common law the authorities cited by appellants' counsel would not apply: Worrall v. Munn, 1 Seld. 229; Braman v. Bingham, 26 N. Y. 483; Ward v. Lewis, 4 Pick. 518; Foley v. Cowgill, 5 Black. 18; and in fact all the authorities relied upon by them are cases where it was sought to qualify the delivery of sealed instruments to grantees by parol evidence. And the evidence was rejected under a technical rule, which has no application to simple written contracts: Pym v. Campbell, 88 Eng. Com. L. 370; Wallis v. Littell, 103 Id. 368; 2 Whart. Ev., sec. 927, and note 10; Butler v. Smith and Tharp, 35 Miss. 457; Barker v. Prentiss, 6 Mass. 430; Hildrith v. O'Brien, 10 Allen, 104.

The rule upon which the first-mentioned class of decisions rest is that a deed, if intended as an escrow, must be delivered to a stranger, and not to the grantee himself. If delivered to the latter, the act is conclusive of the intention of the parties that it shall be operative.

2. The court instructed the jury that unless the contract sued on was based upon actual indebtedness, given for a valuable consideration, or was a power coupled with an interest, the respondent could rescind it at any time before a sale by appellants, by notice to them.

There is surely nothing in this that appellants can complain of. If there was no consideration for respondent's engagement, as the first part of the instruction assumes, it must be conceded she could rescind at any time before becoming bound through a sale by the appellants. And whether there was a consideration was a question of fact, properly left to the jury. Probably the court should have charged the jury that the written instrument sued on did not create "a power coupled with an interest," as the term is understood in this country: Hunt v. Rousmanier's Adm'r, 8 Wheat. 174; Hartly v. Minor's Appeal, 53 Pa. St. 212. But the error, in submitting the question as to whether it did or not, to the jury, as seems to have been done by the latter portion of the instruction, manifestly could not have prejudiced the appellants.

3. The court refused to instruct that the plea of tender "admitted every fact" necessary for the appellants to establish to entitle themselves to a verdict. This was proper. The court had directed the jury to find a verdict for the appellants for the amount tendered and paid into court, in any event. This they did. But the appellants sought by this instruction to preclude the respondent from disputing the facts to prevent a further recovery. This advantage they were not entitled to. The tenders and payment into court only admitted the cause of action as to the sum tendered. It did not conclude the respondent as to any defense she might have against a further recovery. This we deem the better rule: Spalding v. Vandercook, 2 Wend. 431; Davis v. Mellaudon, 17 La. Ann. 97; Eaton v. Wells, 82 N. Y. 576.

Judgment affirmed.

HEIPLE v. CITY OF EAST PORTLAND ET AL.

Filed December 7, 1885.

COUNTY ROADS IN EAST PORTLAND—CITY STREETS—LEGISLATION AFFECTING, CONSTRUED.—The act of October 25, 1872, conferring authority on the city of East Portland to control the public highways within its territory, and excepting the same "out of the jurisdiction of the county court of Multnomah county, does not have the effect to make all existing county roads within the city limits streets of the city, and liable to all the consequences of jurisdiction over them as such.

STREETS AND ROADS DEFINED.—The word "road" uniformly means a public highway. A "street" commonly refers to a public highway in a village or city, and ordinarily includes a sidewalk and roadway.

THE SAME—WORK DONE BY CITY ON COUNTY ROADS.—Work done by a city on a county road within its limits will not make such road a city street, although the adjoining land-owners knew of and acquiesced in the work, when such work was not inconsistent with the proper use of highway as a county road.

DEDICATION OF STREET—FILING MAP—RESERVATION.—The filing and recording of a map on which certain lands are designated as streets cannot have the effect to dedicate other lands as streets which are expressly reserved from the dedication.

APPEAL from the circuit court of Multnomah county. The opinion states the facts.

S. Huelat and Robert McKee, for the appellant.

Cornelius Taylor, for the respondent.

LORD, J. The appellant was the owner of certain lands in East Portland described in his complaint. He alleged that of the lands so owned by him the defendant city had unlawfully and without authority taken and appropriated as a street or part of a street a strip thirty by three hundred and twenty-two feet; that he had not at any time or in any manner dedicated the same as a street, and that the city of East Portland had not by any action, suit, or proceeding whatsoever, opened, laid out, widened, or extended Fourth street over said strip, but that, notwithstanding this, the city authorities, in the year 1883, declared the same a part of Fourth street, and proceeded under the charter, against the appellant's will, to have the same improved as a part of said Fourth street, by grading and planking a roadway, and grading and planking sidewalks thereon, and afterwards, under the provisions of said charter, the expense of making said improvement, to wit, six hundred and seventy-six dollars and eleven cents, was charged against appellant, and declared to be a lien on his other lands abutting upon said thirty by three hundred and twenty-two feet strip claimed and improved as a part of Fourth street; that under and in pursuance of said proceedings the common council of East Portland had caused a warrant to be issued to the marshal of the city, directing and requiring him to sell said abutting property to pay for said improvement, and that the same had been levied by said marshal upon said property, which was then advertised for sale. It is also further alleged that in 1867 the county court of Multnomah county duly laid out, established, and caused to be opened a public county road over and along the identical thirty by three hundred and twenty-two feet of ground now claimed and improved as a street, and that the same has since been

maintained as a county road, etc., concluding with a prayer for an injunction.

The defendant city corporation answered, admitting the establishment of the county road in 1867, alleging that the city had at all times since its incorporation in 1870, occupied and controlled Fourth street, including the portion in dispute, as a street and public highway of said city, and had at all times, at the corporate expense, repaired and kept the same in order as such, with the full knowledge and assent of the appellant; and also specially pleaded the statute of limitations of ten years. As a separate defense it further pleaded, that in 1882 the appellant laid off his land immediately east of and adjoining Fourth street as claimed by the city, into lots and blocks, and had made and recorded a plat thereof, recognizing Fourth street as such at the identical point in question. And as another and further defense it set up the act of October 25, 1872, alleging it to be a grant to the city of the right to control all county roads within its limits. The reply put in issue all the essential matters alleged by the defendant. The suit was referred, the evidence taken, the findings and conclusions of law in favor of the defendant reported to the court, and subsequently, upon motion, after argument, was confirmed by the court, and a decree entered in accordance therewith. To reverse this decree, and to secure the affirmative relief prayed for in his complant, the plaintiff has brought this appeal.

The denial of the injunction was based on the three defenses set up by the defendant, and the sufficiency of these defenses is the question to be determined. In effect, the first defense was that the legislature had granted the premises in dispute—it being then and at the time of such grant a public county road—to the city as a street, and by virtue thereof became a vested right in the corporation. Preliminarily, it may be said that the plaintiff does not deny the existence of the highway as originally established, and the authority of the city to exercise jurisdiction over it as such, but he does deny that the effect of the act was to impose any new liability or burden by virtue of such jurisdiction upon the property-holders or lands adjoining such road or highway that was not included in its original establishment. It seems that the city of East Portland was incorporated by an act of the legislative assembly approved October 25, 1870, and that the land in question was included in its limits. By a subsequent act, October 25, 1872, the authority was conferred on the city to control the public highways within its territory, and excepted the same "out of the jurisdiction of the county court of Multnomah county." Now, say the counsel for the city, the effect of this last act was to make all county roads within the city limits streets of the city, and liable to all the consequences of jurisdiction over them as such. If this proposition is correct, the plaintiff has no case, and the decree cannot be disturbed. As relevant to this discussion, it may be said that one of the effects of the act of 1872 was to withdraw the jurisdiction of the county court over county roads within the limits of the city, and to confer it upon the municipal

authorities. The county left and the city took such roads or highways just as they had been laid out and established by the county court. So far it was simply a change of jurisdiction over the same subject-matter. As a road, the property of the plaintiff was not liable to the assessment or burden sought to be enforced. To make it so liable it must become a street, and to effect this result the argument is that the change of jurisdiction converted the road into a street, and thereby the property in dispute became liable to new and additional burdens, or to be assessed for the improvement made which can only be imposed upon streets. It may be doubted that if the act declared in express words what is sought to be established by inference, thereafter such roads should be streets if the results claimed would follow. To say the least, there is involved in the assumption consequences so dangerous to the rights of private property, that the right to subject the property in dispute to the burden sought to be imposed, ought to be grounded in a power or authority not inferred, but expressly conferred, and, when exercised, strictly pursued.

The case is different where by the act the limits of the city are extended, and new territory is acquired and subjected to the laws and jurisdiction of the municipality. Here, the highway existed as a county road, and subject to county jurisdiction before and after the act of incorporation, and within the limits of the city. Subsequently the jurisdiction was transferred over such roads to the city, and the question is whether such highways continued to retain their character as roads as contradistinguished from streets, without some affirmative legislation impressing that quality upon them. There is a recognized distinction between highways or roads and streets, although they are often used in the same sense as importing a public way for passage or travel. The word "road" is uniformly taken as a public highway, and such is the common and legal acceptation of the word "road:" Respublica v. Arnold, 3 Yeates, 422. It is therefore synonymous with highway. A street commonly refers to a public highway in a village or city, and ordinarily includes a sidewalk and roadway: Himmelmann v. Satterlee, 50 Cal. 69. "The word 'street,' as commonly understood," said Agnew, J., "means a public highway in a town between houses or lots for travel of all persons on foot, or on horseback, or in carriages: Reed v. Erie, 79 Pa. St. 352. "The word 'street' *prima facie* and naturally imports a public highway:" Hamlin v. City of Norwich, 40 Conn. 25. "Strictly," said Marvin, J., "a street is a paved way or road, but the term is used for any way or road in a city or village. It is defined by Bouvier (Law Dict.) as a road in a city or village. Thus a highway is a road, and a street is a road:" Brace v. N. Y. C. R. Co., 27 N. Y. 269; see also Conner v. New Albany, 1 Blackf. 88, 89; Debolt v. Carter, 31 Ind. 355; Clarke v. Commonwealth, 14 Bush, 169; State v. Moriarty, 74 Ind. 104. Referring now to the provisions of the charter, the act of 1870, subdivision 11 of section 2, p. 147, and act of 1882, subdivision 11, provides in the same words that the board of trustees (common council) has power to remove all obstructions from

the public highways, streets, etc., and provides for the construction, repair, and cleaning of the same: Session Laws. Here there seems to be a recognition of two classes of ways, highways and streets. And at this time, and until the act of 1872 was passed, the county roads leading into and within the city were under the control and supervision of the county court. During this *interim* there necessarily were two classes of public ways within the limits of the city: county roads or highways, under the jurisdiction of the county court, and streets, subject to the jurisdiction of the municipality. The act of 1870, art. 4, pp. 149–157, and amendments thereto by the act of 1872, pp. 176–181, Session Laws, which provides for the manner, etc., of improving streets, altering and establishing grades, etc., the word "street" is only used, "highway" is not mentioned. Is not this a further recognition that it was streets and not highways which were to be subject to these provisions?

Again: the act of 1872 conferred a power not granted by the act of 1870—a power to lay out, extend, and open streets. This was a grant of power not only to make a way for the public where none existed before, but a power, as the counsel for the plaintiff contends, to impress on public highways, when abandoned by the county authorities, the character of streets. But section 34 of the act of 1872 provided that "the territory within the limits of the city of East Portland is hereby excepted out of the jurisdiction of the county court of Multnomah county upon the following subjects, to wit, to divide the same or any part thereof into road districts, or to appoint supervisors of road districts for any part thereof, or to lay out, open, or work on the highways therein." Was this any more than saying that the county court shall not have the power to lay out or open highways within the limits of the city, or "to work the highways therein, or to appoint road supervisors, etc., over them? Its jurisdiction was taken away, but were the highways therein disturbed or destroyed? What more was intended or meant than that the city should succeed to the jurisdiction withdrawn, and control and work the highways therein? Is this not an express recognition that there were highways within the limits of the city, and, in effect, giving the city control of them as such? Merely taking from the county and giving to the city the power to work on the highways therein would not of itself effect the character of the highways as such. A transfer of jurisdiction from one tribunal to another does not necessarily affect the nature or character of the thing upon which such jurisdiction is to act. And if such is the object, especially in cases of this character, where important consequences are claimed to follow it, the legislative intent ought to be so expressly declared. To hold, therefore, that the effect of the act (sec. 34) was to convert these highways into streets, with the attendant consequences claimed, the legislative intent ought to be clear, and grounded in something more than mere inference. But the fact is, the inference is otherwise; it is rather that the "highways therein" shall remain as such, subject, however, to the supervision and control of the city to work and keep them in repair.

And if this be not so, what are we to do with the act of 1882, p. 96, Session Laws, repealing section 34 of the act of 1872, and reviving the jurisdiction of the county court over the highways within the city? This act simply transferred the jurisdiction back to the county court in respect to the matters of which it had been deprived by section 34 of the act of 1872. Does this not repel the assumption that the highways within the city were converted into streets by the section of the act last cited? The county court could only take jurisdiction of highways within the city, and we must assume or declare the act unconstitutional; that the effect of section 34 of the act of 1872 did not make such highways streets of the city. Conceding that the city could have done, as counsel for the plaintiff admits, by virtue of another power with which it was invested, by a proper proceeding for that purpose, impressed upon the highways within the city the character of streets, whereby the liability sought to be imposed would attach, it did not nor had not done it when the act of 1882, p. 96, was passed. To say the least, the act evidently contemplates that there were highways within the city limits still in existence, and which had not by any proper authority or proceeding become streets; and that as to these—which had not been made streets—the jurisdiction of the county court was resumed. It is not questioned that the highway as originally established, and which the property in dispute adjoins, ever became a street except by force of section 34, *supra*. This, we have seen, was not the effect of that section. It was then a highway and not a street, and consequently not subject to the local assessment sought to be imposed. The fact that the city had the power to impress the quality of streets upon such highways does not alter the question. It must be exercised to produce that result. And as such highways were not converted into streets by the effect of section 34, they necessarily remained highways within the city, subject to be controlled by the city as such, so far as this section is concerned, and until deprived of that character by the exercise of some other power. As this view harmonizes the different acts and makes their different provisions consistent with each other, and does not involve the necessity of declaring any of them void, and at the same time protects private rights, it is thought to be more in conformity with the rule of construction adopted by the courts in such cases.

The next defense is, user as a street, with the consent of the plaintiff, for more than ten years. This is sought to be proved by work done by the city under the supervision of its street commissioner and other acts on this highway, with the knowledge and consent of the plaintiff. The assumption is, that these things were done on it as a street, and not as a highway, and with the full knowledge of the plaintiff. Neither the work done nor the use was inconsistent with the proper purposes of a highway over which the city had jurisdiction as such, and certainly there is nothing in the testimony to show that the plaintiff ever admitted or understood the use of the highway or the work done on it to be other than what belonged to it as such.

The next defense is estoppel by dedication in this, that the plaintiff had sold lots abutting upon the disputed tracts according to a recorded plat recognizing the same as a street. As stated, this certainly would be a good defense. But the difficulty is, that the plat filed and recorded, which dedicates certain streets on it to public use, contains in the conveyance connected therewith an express reservation to this effect: "Except it is expressly understood that the east half of Fourth street, as represented in the annexed plat of this addition, is the only portion of said street intended to be released, dedicated, and appointed to the public use in this conveyance." And to give emphasis to this reservation, and to show only that portion which is intended by the plaintiff and his wife to be dedicated as a street, red lines are marked on the map to indicate it. This utterly precludes the idea that he ever intended to dedicate the west half as a street, and it is impossible for any one to read the reservation and note the red lines on the map and be deceived. The law in respect to dedication, as ably presented by the city attorney, is not questioned, but its inapplicability arises in the fact, as we view it, that the record shows that there was no intent to dedicate the portion in dispute, but, on the contrary, it was expressly reserved. It follows from these views that the decree must be reversed, and the injunction be made perpetual.

DEDICATION TO PUBLIC USE, HOW MADE: See Vick v. Mayor, 31 Am. Dec. 167, and note; Valentine v. Boston, 33 Id. 711, and note; Godfrey v. City of Alton, 52 Id. 476, and note; Hemphill v. Boston, 54 Id. 749, and note; Stacey v. Miller, 55 Id. 112, and note; Warren v. Jackson, 58 Id. 610, and note; Gardiner v. Tisdale, 60 Id. 407, and note; qualified dedication: Smith v. Gardner, 6 West Coast Rep. 403; must be accepted: People v. Williams, 1 Id. 572.

BLOOMFIELD *v.* BUCHANAN ET AL.

Filed December 8, 1885.

PARTNERSHIP, HOW ESTABLISHED—AGREEMENT TO SHARE PROFITS.—An agreement between two or more parties to engage jointly in a business may constitute a partnership, although that term was not used, nor any express mention made in regard to profits or losses. If it were understood between the parties that there was to be a community of profits, it would constitute a partnership.

THE EVIDENCE REVIEWED, AND HELD TO ESTABLISH A PARTNERSHIP between the plaintiff and the defendants in certain government contracts.

APPEAL from the circuit court of Multnomah county. The opinion states the facts.

C. E. S. Wood and *Bloomfield*, for the appellant.

F. R. Strong and *R. S. McKee*, for the respondents.

THAYER, J. Appeal from a decree of the circuit court of Multnomah county dismissing the appellant's complaint. The suit in that court was to establish a partnership between the parties concerning certain contracts with the United States to furnish supplies to the posts of Vancouver

Barracks and Fort Canby, in Washington territory and Portland, Oregon; also to obtain a share of the profits made from said contracts.

It was alleged in the said complaint that on or about April 1, 1884, the appellant entered into an equal copartnership with the respondents, by parol agreement, for the purpose of bidding for and fulfilling said contracts; that the contracts were to be bid for by the respondents respectively, said W. J. Buchanan to bid for the Vancouver contract, Isaac Buchanan for the Fort Canby contract, and the said John M. Leavens for the Portland contract, and that the said appellant should give his personal attention to the fulfillment of the two former; that the profits and losses were to be divided and borne by the said four copartners equally; and in which it was further alleged that profits had been realized from the said contracts. The respondents severally denied the said copartnership as between any of the said parties, and the respondents W. J. and Isaac Buchanan each alleged in his answer that the appellant was employed in and about his contract as purchasing agent.

The case was referred to a referee to take the evidence and find the conclusions of fact and law. A great mass of testimony was taken by the referee, a portion of which bore directly on the point in issue, but a larger part by far was directed to collateral matters, and to contradiction upon slight affairs. The counsel upon both sides at the hearing laid very great stress upon the alleged discrepancies in the testimony of the parties given in the case. The testimony shows that the contracts were let to the said respondents severally about the twentieth of May, 1884; that the bids therefor were severally made by said respondents; that the appellant was not named in the bids or contract; that during the previous season, extending until the last of May, 1884, the appellant worked for Burnell & Co., of which Leavens was a member, in buying produce to fulfill a similar contract let to said company to supply forts Canby and Stevens, for which he claimed that they were to give him one half of the profits, though they claim that they were to give him a certain sum per month therefor; that for more than three months the appellant gave his personal attention to fulfilling the Vancouver and Fort Canby contracts in question, and that Leavens also gave his attention to the same business. It appears that the respondents Isaac and W. J. Buchanan were boatmen, engaged in business on the Columbia and Willamette rivers, and that they gave but little attention to said matters. Leavens is a commission merchant residing at Portland. The appellant was flatly contradicted by each of the respondents as to his being a partner in the contracts, or having any interest in the business; and if the determination of the suit rested simply upon appellant's assertion of the fact, and respondents' denial of it, we unhesitatingly would affirm the decree appealed from. That would present a case of one witness against three, and each entitled to at least the same degree of credit. In such a case the party having the affirmative could not reasonably claim to have established the fact in issue by a preponderance of proof, and would necessarily fail to maintain his suit.

Cases, however, do not always depend upon the general credibility of witnesses. The evidence of one person may ordinarily be as good as that of another, and yet their respective testimony in a particular case not have equal value. The civil code recognizes this, and provides that "they [the jury] are not bound to find in conformity with the declarations of any number of witnesses which do not produce conviction in their minds against a less number, or against a presumption or other evidence satisfying their minds:" Civ. Code, sec. 835, subd. 2.

From a close inspection of the evidence it will, I think, be found that the facts testified to by the appellant in regard to the formation of the partnership are not successfully controverted by the testimony of the respondents. Their assertions that the appellant had no interest in their respective contracts, that he was only an employee, and that any evidence he had given, or any conversations he had stated, showing or attempting to show that he was a partner in the business were not true, were more in the nature of conclusions than the denial of facts. The appellant had testified to his talk with Isaac Buchanan in March of 1884, at the St. Charles saloon, about the probable advantages of contracts of that character for the ensuing year; his talk with Captain Buchanan a few days afterwards upon the same subject, and of his having advised the captain to go in with him, appellant, and take the contracts for that year; his subsequent talk with Leavens upon the subject and about Burnell's proposition to get him security and of going in with him, and of Leavens's disparagement of Burnell and proposal to go in himself; his proposal to see Blurock and get him to take the Vancouver contract, and he and the appellant take the contracts below forts Canby and Stevens, and to various other detail matters as having taken place and resulting in obtaining said contracts, and of his continuance to fulfill them for several months. He gave a complete narrative of the affair, and of the part he acted in it. The account he gave embraced a great number of steps that were taken and the incidents which occurred in securing the contracts, and the part he performed in carrying them out. The statement is a very consistent one, to my mind.

The evidence in regard to the standing of the appellant, his experience in life, business qualifications and connections, shows very clearly that he was the kind of a man who would be likely to engage in taking such government contracts, and who would be useful in securing and fulfilling them; and his statement of the minute facts attending the bidding for and obtaining the contracts in question is not to be brushed away by a bare denial that he had any interest in them. What is there unreasonable about his story? The respondent says he had no capital or credit. The former was not needed. No money would ordinarily be required to be advanced until received from the quartermaster, and the lack of credit may have been the inducement to enter into the partnership. They say his character was bad, but they trusted him, employed him, they say, as a purchasing agent. Their denial of his possessing business qualifications may be answered

in the same way. But the most difficult question, to my mind, in view of the evidence, is to understand what relation the appellant maintained with the respondents in the affair if he was not a partner. They deny that he had any proprietary interest in the venture, but have failed to make any satisfactory explanation as to the *status* he occupied. That he was a purchasing agent affords no solution of the question. He may have been that and at the same time been a partner. The respondents emphatically assert that he was only a purchasing agent, but how do they prove it? They do not say when or where they employed him in that capacity, nor anything as to the compensation they were to pay him. I think the evidence fails to show that he was at work for wages. It tends to show, upon the contrary, that the respondents were induced by the appellant to take the contracts; that he was the active, moving spirit in the undertaking. The respondents' counsel claims that the appellant's counsel fails to show a partnership; that he does not use the term "partnership," nor say anything about bearing the losses. I do not think the word "partnership" need be used in order to create that relation between parties, and I very much doubt whether the question of loss ever entered the minds of parties bidding for government contracts. However that may be, it is sufficient if that obligation would attach under the circumstances of their arrangement, though the rule would no doubt be different if it were stipulated that a party should receive a share of the profits as a compensation for services of such party to be rendered in conducting the business. An agreement between two or more parties to engage jointly in the business of supplying a government post might constitute a partnership, although the term were not used, nor any express mention made in regard to profits or losses. If it were understood between the parties that there was to be a communion of profit it would be a partnership. "A communion of profit implies a communion of loss, for every man who has a share of profits of a trade ought also to bear his share of the loss:" Collyer on Part., sec. 18. And it is not necessary that there should be an express stipulation between partners to share the profit and loss, as that is an incident to the prosecution of their joint business: Id., note 3.

If the respondents had shown by satisfactory proof that the appellant was employed as an agent for wages, they would have established a relation he sustained to them, or some of them, that would have rebutted the appellant's testimony as to his being a partner, but their entire failure to prove that serves to strengthen the appellant's theory of the affair. In view of the admitted circumstances of the transaction between the parties, I cannot discover any other reasonable hypothesis than that they were partners, as alleged in the complaint. The acts performed by the appellant, and the interested part he took in the business, rebut any presumption that he was a mere hired agent, and in the absence of convincing proof of facts that he was so hired, leaves no alternative but to conclude that he was expected to participate in the profits to be derived from the contracts. Nor can I discover any rea-

son why he should not. He evidently initiated the enterprise, gave his time and attention to prosecuting it, was an important factor in the business, and no sufficient excuse is shown for excluding him from its benefits. This review only extends to the one question, Was the appellant a partner, and entitled to share in the profits arising from the contracts in suit? That is the only question considered by the court below, and as that court determined that no such partnership existed, no accounting was directed, and none has been had. This court having taken a different view of the question, the decree appealed from will have to be reversed, and the case sent back for an accounting, and with directions that the said respondents do each of them account in such manner as the court below may direct, for the amount of profits realized from the said contracts, and that when the same shall have been ascertained, a decree be entered in favor of the appellant for the recovery of a fourth thereof. The same rule will be observed in this case as that adopted in Cogswell v. Wilson, 11 Or. 371; 4 West Coast Rep. 489.

I have not deemed it necessary to refer in this opinion to the various questions contended for, and controverted in the evidence. It would have been almost an endless task to have done so, and been of no material benefit. I have looked over the testimony with considerable care, and am satisfied that the equities are with the appellant, so far as his being entitled to share in the profits arising out of the several contracts, and that the bidding for and taking said contracts were in pursuance of an understanding between all the parties that they should be jointly interested in them, and divide the profits equally, if there are any. I think the evidence shows that profits have been realized, but it requires an accounting to ascertain the amount. A decree will be entered in accordance with this opinion, and the case remanded for such purpose.

PARTNERSHIP INTER SE, HOW ESTABLISHED: See Kayser v. Mangham, 6 West Coast Rep. 461; Parcher v. Anderson, 5 Id. 422; Cogswell v. Wilson, 4 Id. 489. Sharing in profits, when constitutes: Champion v. Bostwick, 31 Am. Dec. 376, and note; Bradley v. White, 43 Id. 435, and note; depends on intention of parties: Price v. Alexander, 52 Id. 526.

MESNER *v.* KNAPP ET AL.

Filed December 22, 1885.

AT COMMON LAW WAGERING CONTRACTS WERE NOT ILLEGAL, unless contrary to public policy, morality, or the like.

TO CONSTITUTE A WAGER THERE MUST BE TWO OR MORE contracting parties having mutual rights in respect to the thing wagered, and each of the parties necessarily risks and has a chance to make something upon the happening or not of an uncertain event.

THE SAME—PURSE OFFERED ON HORSE-RACE.—A purse or prize offered by a party, and to be awarded to the successful competitor in a contest, such as a horse-race, in which such party does not engage, is not a wager.

FRAUD, HOW ALLEGED.—In charging fraud, the facts must be stated showing in what the fraud consisted. A general allegation that a party acted fraudulently, or made fraudulent statements, is not enough.

THE SAME—FRAUDULENT VIOLATION OF CONDITIONS OF
recover a prize offered by an association, for the successful c
answer setting up the rules and regulations of the society, w
for any prize or purse upon its track, and facts showing th
entered a horse disqualified under such rules, constitutes a g

APPEAL from the circuit court. The opinion

A. H. Tanner, for the appellants.

C. H. Carey, for the respondent.

LORD, J. This is an action to recover a purs
offered by defendants to the owner of the horse
in the best time less than two minutes and twent
view Park. The complaint alleges that the def
under the name of the North-western District
tion, and that in the year 1883 they offered a "s
of two hundred and fifty dollars to the owner of
trot a mile in the best time less than two mi
seconds at the City-view Park, in the said count
of September, 1883; that the plaintiff was the ow
which was duly entered by him for such race, i
conditions and rules of the defendant's associati
did, in the manner and time prescribed by the
the directions of the board of directors thereof, t
in less than two minutes and twenty-five secon
utes and twenty-four and one half seconds, bu
time made in said race, and that the defendants
pay, etc. The defendants filed a demurrer to t
ground of a want of facts to constitute a caus
overruled, and this is the first error relied upon
the appeal.

The contention of the defendants is that the p
or wager, and as such the promise to pay it was
no action will lie to enforce the payment of su
proposition assumes that the purse, prize, or pre
or wager it becomes necessary to ascertain the defi
Bouvier defines a wager to be "a contract by whi
agree that a certain sum of money or other thin
livered to one of them on the happening or not h
tain event." A bet is a wager, though a wager is
Cassard v. Hinman, 1 Bosw. 212. "A bet or w
"is ordinarily an agreement between two or mor
or some valuable thing in contributing which all
shall become the property of one or some of then
the future of an event at present uncertain; and
or thing thus put upon the chance:" Harris v. W
common law a wager constituted a good contr
trary to public policy, morality, or the like: Chi
All wagers, therefore, at common law, were not ille
Cowp. 729; Good v. Elliott, 3 T. R. 693; Bunn

It was not illegal at common law to make a bet or wager on a horse-race, and an action to recover a wager won has been maintained: McCallister v. Hayden, 2 Cowp. 438; Blaxton v. Pye, 2 Wils. 309; Gibbins v. Governeur, 1 Denio, 170; Harris v. White, 81 N. Y. 544; Comly v. Hillegass, 94 Pa. St. 132. But by statute in England, and most if not all the states, all contracts by way of gaming or wagering are null and void. And the inquiry now is whether, upon the admitted facts, the purse or prize offered comes within the meaning of a wagering contract.

Now according to the definition of wager, there must be two or more contracting parties having mutual rights in respect to the money or other thing wagered, or as sometimes said, "staked;" and each of the parties necessarily risks something and has a chance to make something upon the happening or not happening of an uncertain event. But a purse or prize offered by a party and to be awarded to the successful competitor in a contest in which such party does not engage, nor has any chance of gaining, but only perhaps of losing, is without the element of a chance of gain or a risk of loss which characterizes the wager agreement. The distinction has been stated thus: "In a wager or a bet, there must be two parties, and it is known before the chance or uncertain event upon which it is laid or accomplished who are the parties who must either lose or win. In a premium or reward, there is but one party until the act or thing, or purpose, for which it is offered has been accomplished. A premium is a reward or recompense for some act done; a wager is a stake upon an uncertain event. In a premium it is known who is to give before the event. In a wager it is not known till after the event. The two need not to be confounded: Alvord v. Smith, 63 Ind. 59. In Harris v. White, *supra*, Folger, J., makes this distinction, that in a bet or wager, "each party gets a chance of gain from others, and takes a risk of loss of his own to them;" which is an ingredient that does not enter into "a purse or prize offered by a person for the doing of something by others, into the strife for which he does not enter," as "he has not a chance of gaining the thing offered; and if he abide by his offer that he must lose it and give it over to some of those contending for it is reasonably certain." There was no error in overruling the demurrer.

The next assignment of error is in sustaining the demurrer of the plaintiff to the new matter set up in the answer of the defendants. The ground of the demurrer was that the new matter pleaded did not constitute a defense. The answer set up in detail the rules and regulations of the society which governed in competing for any prize or purse upon the track of the association, etc., and the facts constituting the alleged fraud in entering an ineligible and disqualified horse under such rules and regulations. In support of the demurrer it was claimed that the plaintiff was not bound to know what such rules and regulations were. But the answer to this is found in the complaint, in which the plaintiff alleges that the horse "was duly entered by him for such race, in accordance with the conditions and rules of the defendant's

association," etc. It is also claimed that the facts const fraud are not sufficiently specified. The rule is element charging fraud the facts must be stated showing in what t the party consisted. It is not enough to indulge in a gen tion that a party acted fraudulently, or made fraudulent but the facts constituting the fraud, or showing the manne petration, must be distinctly stated, so as to apprise the ad what is meant to be proved, and afford him an opportunity it, or to inform the court, whose duty it is to declare the upon the facts. The matter set up is not open to this obje facts showing in what the fraud of the plaintiff consisted was guilty of it, are distinctly specified and averred. It therefore, to sustain the demurrer, and the judgment must

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GAMING, WHAT IS, AND EFFECT OF, CIVILLY AND CRIMINALLY.—A ga has been defined to be "an agreement between two or more persons to ris or property in a contest or chance of any kind where one may be gainer loser:" Bell v. State, 5 Sneed, 507. Substantially the same definition has other courts: See Harris v. White, 81 N. Y. 532; People v. Sargeant, 8 C v. Smith, 2 Yerg. 281; Portes v. State, 27 Ark. 360; Harrison v. State, Eubanks v. State, 3 Heisk. 490. Wharton defines the offense in fewer stake money on a chance:" Wharton's Crim. L., sec. 1465. At the comm ing, as by playing at cards, dice, etc., when innocently practiced, and as the better, as it is said, to fit a person for the business of life, was not unla winner might even maintain a special *indebitatus assumpsit* for the stake w

If, however, the games were such as tended to immorality; or against pu became an incitement to a breach of the peace, so as to create a nuisance; feelings or interest of others injuriously; or exposed them to ridicule; or w by means of fraud or cheating, as by playing with false cards, etc., they at common law: Bac. Abr., tit. Gaming; Archb. Crim. Pr., tit. Gaming, a The tendency at the present time, both on the part of the legislature and of in the United States as well as in England, is to hold all gaming or wage void, on ground of public policy, and to prohibit the maintenance of all a and, further than this, to constitute the participation in, and carrying on of an offense. Statutes have been passed in all of the United States and in hibiting the carrying on of such games, and punishing the offender with fin ment, or both. Such statutes differ greatly in their details, and the conseq that a great diversity of judicial opinion has arisen.

To constitute the offense of gaming, the chance upon which the bet is mad controlling element of the game: Whart. Crim. L., sec. 1465; or as is sai Smith, Meigs, 99, "there must not only be a betting upon the determinatio but the course of action to bring about such event must have originated an with a view to determine the bet." It is not necessary that the stake sho before the game commences; an agreement to pay according to the result of th cient: State v. Leitch, 17 Iowa, 28. But a bet is complete when the offer to b and placing money on a gaming-table, without objection by the player or game, is an offer and acceptance, and renders the parties playing guilty of gaming: State v. Welch, 7 Port. 463; but see *contra*, Bagley v. State, 1 Every separate bet on a game, though at the same sitting, constitutes a se Buck v. State, 1 Ohio St. 61; Torney v. State, 13 Mo. 455; Cameron v. 383; Swallow v. State, 20 Id. 30; but see *contra*, where it is held that cons at the same sitting constitute but one offense: Heisler v. State, 20 Ga. 155 State, 13 Id. 396.

The amount of the stake is immaterial: State v. Albertson, 2 Blackf. 251 thing actually bet be property of any value. If the playing be for checks, no ments understood by the players to be a representative of value, and whi wards to be exchanged for money, or other property, it is sufficient: Walto Tex. 381; Ashlock v. Commonwealth, 7 B. Mon. 44; Porter v. State, 51 bons v. People, 33 Ill. 442; nor need the playing and betting be done by th in order to constitute the offense. One playing a game at which others are b

betting on the play of others, without himself participating in the playing, may be guilty of the offense: Smith v. State, 5 Humph. 163; Fugate v. State, 2 Id. 397; Johnson v. State, 4 Sneed, 614; Howlett v. State, 5 Yerg. 145. But see Ex parte Ah Yum, 53 Cal. 246.

WHAT GAMES ARE CRIMINALLY UNLAWFUL.—In the interpretation of statutes prohibiting the playing of certain games the courts have been careful to distinguish between the offense under the statute and the innocent playing of games, even when for a stake or prize: Whart. Crim. L., sec. 1464; Harris v. White, 81 N. Y. 532; nevertheless a great diversity of opinion exists as to what games are criminally unlawful under such statutes. Thus, it has been held a criminal offense to play at keno: United States v. Hornebrook, 2 Dill. 229; Miller v. State, 48 Ala. 122; Trimble v. State, 27 Ark. 355; Porter v. State, Id. 360; New Orleans v. Miller, 7 La. Ann. 651; or cock-fighting: Johnson v. State, 4 Sneed, 614; Commonwealth v. Tilton, 8 Met. 232; Bagley v. State, 1 Humph. 486; or rondo: Rainey v. State, 14 Tex. 409; Barker v. State, 12 Id. 273; or throwing dice: Darling Jones v. State, 26 Ala. 155; but where a certain price is paid for each chance, so as to make the game a raffle, it is not: Norton v. State, 15 Ark. 71.

So, also, playing at nine-pins is, although the amount risked is but the price of the game: Bass v. State, 37 Ala. 469; Commonwealth v. Goding, 3 Met. 130; State v. Records, 4 Harr. 554; but see *contra*, State v. Gupton, 8 Ired. 271; Sigel v. Jibb, 3 Stark. 2. Playing cards for money, cigars, or liquor is: Hitchings v. People, 39 N. Y. 454; Commonwealth v. Terry, 2 Va. Cas. 77; State v. Albertson, 2 Blackf. 251; Bachellor v. State, 10 Tex. 261; McDaniel v. Commonwealth, 6 Bush, 326; State v. Maurer, 7 Iowa, 406; State v. Coster, 10 Id. 453; State v. Lietch, 17 Id. 28; State v. Bishell, 39 Id. 42; Commonwealth v. Taylor, 14 Gray, 26; Commonwealth v. Gourdier, Id. 290; or pool: State v. Jackson, 39 Mo. 420; Rogers v. State, 26 Ala. 56; or faro: Allen v. Watson, 2 Hill (S. C.), 319; State v. Markham, 15 La. Ann. 498; State v. Doon, R. M. Charlt. 1.

Under section 330, of the California penal code, one who merely bets at a game of faro is not guilty of gaming, nor is such person an accessary to the crime, as the interest in the two cases is quite different: Ex parte Ah Yum, 53 Cal. 246. Lotto is an unlawful game: Lowry v. State, 1 Mo. 722; and also thimble or thimble the balls: State v. Red, 7 Rich. 8; or a shooting-match: Myers v. State, 3 Sneed, 98. Horse-racing is: Tatman v. Strader, 23 Ill. 493; Garrison v. McGregor, 51 Id. 473; Ellis v. Beale, 18 Me. 337; Cheeseman v. State, 8 Blackf. 332; Wade v. Dennis, 9 Ired. 35; Shropshire v. Glascock, 4 Mo. 336; McKeon v. Caherty, 1 Hall, 300; Wood v. Wood, 3 Murphy, 458; Haskett v. Wootan, 1 Smed. & M. 180; Tollett v. Thomas, L. R. 6 Q. B. 515; Buston v. Buston, L. R. 1 Ex. D. 13; Higginson v. Simpson, L. R. 2 C. P. D. 76; Morgan v. Beaumont, 121 Mass. 7; *contra:* Harrison v. State, 4 Coldw. 195; Harliss v. United States, 1 Morris, 160; State v. Porce, 23 Ark. 726; State v. Hayden, 31 Mo. 35; Shelton's Case, 8 Gratt. 592; McElroy v. Carmichael, 6 Tex. 456; nor will the fact that the race was run on a track duly chartered authorize betting: Cain v. McHarry, 2 Bush, 263.

Selling prize-candy packages is: Eubank v. State, 3 Heisk. 488; or a gift enterprise, so called, where a tradesman, as an inducement to purchase, gives his customers tickets entitling them to a chance to win certain other articles: Bell v. State, 5 Sneed, 507. In Alabama, taking a chance in a raffle, or betting at a game duly licensed and paid for, is not: Hawkins v. State, 33 Ala. 433; State v. Attaire, 14 Id. 435; State v. Mozeley, Id. 390; Norton v. State, 15 Ark. 71. Nor is playing on a duly licensed billiard-table, the loser to pay for the price of the game, because that is one of the rules of the game, and the winner gains nothing by it: People v. Sargeant, 8 Cow. 139; Blewett v. State, 34 Miss. 606; Parsons v. Alexander, 1 Jur., N. S., 660; Harbaugh v. People, 40 Ill. 294; *contra:* Ward v. State, 17 Ohio St. 32.

In England, the following games have been held lawful if played for a stake: Foot-racing: Batty v. Marriott, 5 C. B. 818; Coombs v. Dibble, L. R. 1 Exch. 248; Emery v. Richards, 14 Mee. & W. 728; cricket: Walpole v. Sanders, 7 Dow. & Ry. 130; Jeffreys v. Walter, 1 Wils. 220; Hodson v. Terrell, 1 C. & M. 787; dominoes: R. v. Ashton, 1 El. & Bl. 286; coursing: Daintree v. Hutchinson, 16 Mee. & W. 87; Hirst v. Molesburg, L. R. 6 Q. B. 130; rowing matches: Bostock v. R. R. 3 M. Dig. 274; foot-ball and quoits: Manby v. Scott, 1 Mod. 136; wrestling matches when not prize-fights: Kennedy v. Gad, 3 Car. & P. 376.

When a bargain concerning stock or other property for an option to call is, and when not: See Kirkpatrick v. Bousall, 72 Pa. St. 155; Smith v. Bouvier, 70 Id. 325; Brua's Appeal, 55 Id. 294; Bigelow v. Benedict, 70 N. Y. 202; Story v. Solamon, 71 Id. 420; Harris v. Tumbridge, 83 Id. 92.

WAGERING CONTRACTS, AND EFFECT OF CIVILLY.—As previously stated, at common law certain wagering contracts were valid, and could be enforced in a civil action. Thus

it was previously held that a wager on the result of a lawsuit, no fraud being intended, was valid: Jonas v. Randall, Cowp. 37. So also as to a wager on the price of foreign bonds: Morgan v. Pebrer, 4 Scott, 230; or that a certain horse would win a race: Moon v. Durden, 2 Exch. 22; or on the age of the parties betting: Hussey v. Crichett, 3 Camp. 168; Bland v. Collett, 4 Id. 157; Fisher v. Waltham, 4 A. B. 889; or that a railroad would be completed in a certain time: Johnson v. Fall, 6 Cal. 359. And some of the earlier American decisions were to the same effect: Barret v. Hampton, 2 Brev. 226; Ross v. Green, 4 Harring. 308; Dunman v. Strother, 1 Tex. 89; Bunn v. Riker, 4 Johns. 426; Morgan v. Richards, 1 Browne (Pa.), 171; Grant v. Hamilton, 3 McLean, 100.

But, on the contrary, in many states all wagering contracts have been held void: Collamer v. Day, 2 Vt. 144; Carrier v. Brannan, 3 Cal. 328; Amory v. Gilman, 2 Mass. 1; Babcock v. Thompson, 3 Pick. 446; Lewis v. Littlefield, 15 Me. 233; Hoit v. Hodge, 6 N. H. 104; Edgall v. McLaughlin, 6 Whart. 176; Gridley v. Dorn, 57 Cal. 78; Rice v. Gist, 1 Strobh. 82. At common law, however, wagers that affected the interest or feelings of others, or were indecent or libelous, or against public policy, or tended to a breach of the peace, were void. As illustrations of such void wagers are, that an unmarried woman would have a child by a certain day: Ditchburn v. Goldsmith, 4 Camp. 152; on the sex of a third person: De Costa v. Jones, Cowp. 729; on the life of Napoleon Bonaparte: Gilbert v. Sykes, 16 East, 150; that a defendant in a criminal prosecution would be acquitted: Evans v. Jones, 5 Mee. & W. 77; that a certain person would not marry within a given number of years: Hartley v. Rice, 10 East, 22.

Wagers on the result of an election have always been considered void: See Bunn v. Riker, 4 Am. Dec. 299. In England all wagers are now forbidden by statute: 8 & 9 Vict., c. 109, sec. 18. Similar statutes exist in many of the United States. Where an illegal wager is made the parties to it may, before the wager is decided, recover their stakes from each other or the stakeholder; but after the money has been lost and won, and the result known, neither party can maintain an action: Gridley v. Dorn, 57 Cal. 78; Hill v. Kidd, 43 Id. 615; Johnston v. Russell, 37 Id. 672. And in several of the states the loser is permitted by statute to recover the amount of the stake from the winner after it has been paid.

DROUILHAT *v.* SCHMIDT ET AL.

Filed December 17, 1885.

UNDERTAKING ON APPEAL—POWER OF COURT TO ENTER JUDGMENT AGAINST SURETY. Where a person signs an undertaking on appeal he makes himself a party to the proceeding, and the court thereby acquires such jurisdiction over him in the case that, by force of the statute, it can enter a judgment against him. To warrant the exercise of such power all the conditions necessary for its existence, under the law of its creation, must have arisen. But a mere informality in the undertaking will not destroy the power if it can be discovered therefrom what the surety has undertaken to do.

THE SAME—UNDERTAKING MUST BE EXECUTED BY APPELLANT.—The provision of the statute requiring the appellant, on appeal from the justice's court, to give an undertaking, "with one or more sureties," must be construed as intending such undertaking to be executed by the appellant. If not, the conditions of the statutory undertaking are not complied with, and the court has no power to render judgment against a surety thereon.

THE SAME—FAILURE OF SURETY TO QUALIFY.—The fact that a surety on such undertaking neglects to make the requisite affidavit, showing that he was qualified to become such surety, cannot be taken advantage of by him to defeat his liability on the undertaking.

APPEAL from the circuit court of Multnomah county. The opinion states the facts.

P. L. Willis, for the appellants.

Alfred F. Sears, jun., for the respondent.

THAYER, J. This appeal is from the circuit court for the county of Multnomah. The appellant, John Rottner, became, or attempted to

become, surety for Herman Schmidt, upon appeal from justice's court to said circuit court. The case on appeal was tried in the latter court, and judgment given in favor of the respondent therein against said Schmidt, and thereupon judgment was rendered against said Rottner as surety on the appeal. The latter, after an ineffectual attempt to have it set aside as unauthorized, has appealed therefrom to this court, and the ground of his appeal is that he never became such surety; that he signed a paper which the respondent claims is an undertaking upon appeal, but which he claims was an absolute nullity. That presents the only question for our consideration. The paper signed was evidently intended as an undertaking on appeal, though very loosely gotten up, and in some respects was imperfect. There was no sufficient affidavit as to the qualifications of the surety indorsed upon it. The appellant in the case had not signed it, and from that and other circumstances it appears very awkward and indefinite. But I think the main, and probably the only, objection the appellant Rottner can urge against it is the failure of Schmidt, the original appellant, to sign it. When a person signs an undertaking upon appeal he makes himself a party to the proceeding, and the court thereby acquires such a jurisdiction over him in the case that, by force of the statute, it is empowered to enter a judgment against him in a certain event.

It is true, as claimed by the appellant's counsel, that "the power of the court to give judgment against a person as a surety, and without any opportunity to such person to be heard before such judgment against him is rendered, is a special statutory power, in derogation of common law," and will not be permitted until all the conditions necessary for its existence, under the law of its creation, are clearly shown to have arisen. But it does not follow that a mere informality of the undertaking destroys the power. Whenever it can be discovered from the instrument what the surety has undertaken to do, and it has effected its object, he cannot claim a release from the obligation on account of any formal defect in the instrument. He voluntarily executed it for a purpose, and was bound to know the full extent of liability he assumed. By the act upon his part the purpose was accomplished; how can he therefore, in consequence of some formal imperfection, be permitted to allege a non-liability? The law looks to the substance and not the form, the question would arise at once, what did he sign the instrument for. No one can trifle with legal proceedings in that way. The neglect of the appellant to make the requisite affidavit showing that he was qualified to become such surety can avail him nothing; nor the uncertainty or indefiniteness of the paper signed, provided it can be ascertained therefrom what it was intended for. The right to object to it for any such reason belonged exclusively to the adverse party, who could take advantage of the defect in the particular referred to, or waive it.

When, however, the defect is one of substance, the rule would be different. "The party must be a surety upon an undertaking," an undertaking required by the statute to be given upon appeal. The

instrument may be inartistically drawn and imperfect in many respects, and still be binding; but if it lack an essential feature required by the statute it will not be an undertaking, although signed by a party and containing an appropriate obligation. If the law required the undertaking to be under seal, and contained the provision it does, that judgment could, in the case specified, be given against the surety. No one would contend that such a judgment could be given against a surety in an undertaking not under seal. The adverse party in such a case would be compelled to resort to a common-law remedy if he had any at all. So in this case, if the law requires the undertaking to be signed by the appellant, he not having signed it, it would be no undertaking upon which the court could give a judgment against the appellant. The whole question therefore turns upon the construction to be given to the statute upon the subject. The statute provides that the undertaking of the appellant, in such case must be given with one or more sureties, to the effect that the appellant will pay all costs and disbursements that may be awarded against him on the appeal, and that when judgment is given in the appellate court against the appellant, either with or without trial of the action, it must also be given against his sureties in his undertaking, according to the nature and effect of it. If the giving an undertaking by the appellant implies that he must sign it then the instrument executed in this case was not an undertaking. The English, and many of the American courts, have construed the word "with" before the words "one or more sureties," when used in a similar connection, to mean the same as the word "by." In that case the statute would read "the undertaking of the appellant must be given by one or more sureties." The following cases seem to have taken the view referred to: Dickson v. Dickson, Bos. & Pul. 444; Keane v. Deardon, 8 East, 298; Lushington v. Dose, 7 Mod. 304; Boyce v. Wilkins, 5 Serg. & R. 329; State v. Bowman, 10 Ohio, 450; Shelton v. Wade, 4 Tex. 150; Toland v. Swearingen, 39 Id. 450; Harrison v. Bank of Kentucky, 3 J. J. Marsh. 375; Bennett v. Warren Circuit Court, Hard. 172; Vallance v. Sawyer, 4 Me. 62; Thom v. Savage, 1 Blackf. 51; Welch v. Stowell, 2 Mich. 337. Upon the other hand it has been held differently in New York, Massachusetts, and Tennessee: Ex parte Brooks, 7 Cow. 428; People v. Judges of the Monroe Common Pleas, 1 Wend. 20; Bean v. Parker et al., 17 Mass. 604; Leach v. Drake, 16 Pick. 203; Hardaway v. Biles, 1 Smed. & M. 657.

In many of the decisions in which it is held to be unnecessary for the appellant to execute, a good deal of stress is laid upon the fact that he is liable the same without the undertaking, and they claim the objection that the legislature did not intend to require a needless thing. And it is said in some of them that the law could not extend to infants and married women if construed to require the appellant to execute the instrument, though as to the latter, married women, that reason has long ceased. I have not been able to find any cases since the reformed practice was adopted bearing upon the subject, except one which is cited by the appellant's counsel. It is that of Richard-

son v. Craig, 1 Duer, 666, and that is under a provision of the New York code, which would seem by its terms not to require the appellant to execute the undertaking. I think that the weight of authorities is in favor of the respondent's position that the statute may reasonably be construed as not requiring the appellant to execute the undertaking, yet when its language is considered, and it is known that the act was not prepared hastily and carelessly, as legislative acts often are, as suggested by Chief Justice Gibson in Boyce v. Wilson, *supra*, but deliberately, by a commissioner highly learned in the law, and appointed especially to prepare a code of practice, I am inclined to think that it should be construed according to the natural import of the language. The appellant is required to give an undertaking with one or more sureties. That would imply, I would suppose, that he should be a direct party to it as well as the surety. If a party were to agree to give a promissory note, with one or more sureties, there could be no question but that he would be required to execute it as well as the surety. The appearance and form of the instrument in this case show that it was intended to be signed by the appellant, and so far as I am acquainted with the practice that mode has always been observed. There may be no apparent reason for requiring the appellant to sign an undertaking in such a case, but if the legislature has so provided, the court cannot consider whether it was necessary or not. The question of expendiency in such cases belongs entirely to the legislative branch of the government. There is a difference of opinion between the members of the court upon the construction of the provision of the statute in question. The chief justice is of the opinion that upon the authorities cited, the said provision does not require the undertaking to be signed by the appellant; that it is as effectual without it. Judge Lord, on the other hand, regards the matter as somewhat doubtful, but is inclined to concur in the view I have expressed.

The judgment appealed from will therefore be reversed.

STATE *v.* GAUNT.

Filed December 14, 1885.

SELLING LIQUORS WITHOUT LICENSE—REPEAL OF ACT CREATING OFFENSE.—Section 726, so-called, of the code of criminal procedure, remained a part of the act from which it was taken (title 1, chap. 28, Misc. Laws), and has never been incorporated into the code of criminal procedure by any action of the legislature. Such section was repealed by the act of February 17, 1885, by implication.

REPEAL OF STATUTE IMPOSING PENALTY—SUBSEQUENT ENACTMENTS.—A penalty is an incident of the offense for which it is provided, and cannot stand without it. Consequently, upon a repeal of the provisions of an act creating the offense, the provisions fixing the penalty are also repealed, and cannot be made applicable to a subsequent act creating the same offense, unless there is an express declaration to that effect by the legislature.

A PENALTY CANNOT BE RAISED BY IMPLICATION, but must be expressly created and imposed.

NO COMMON-LAW OFFENSES IN OREGON—OFFENSE WITHOUT PENALTY.—In Oregon there are no indictable common-law offenses. Consequently the violation of a statute, creating an offense, but not imposing a penalty, while indictable as a misdemeanor at common law, as for a contempt against the statute, is not indictable as such under the Oregon statute.

APPEAL from the circuit court of Klamath county. The opinion states the facts.

E. B. Watson and *H. K. Hanna*, for the appellant.

W. H. Holmes and *E. D. DePeat*, for the respondent.

WALDO, C. J The defendant was accused by the grand jury of Klamath county of selling spirituous liquors without a license, contrary to the statute in such cases made and provided.

The case was argued here on the defendant's demurrer to the indictment. The act, contrary to the provisions of which the defendant is alleged to have sold, is the act of February 17, 1885, entitled "An act to regulate the sale of spirituous liquors." The act provided no penalty. Sections 726 and 753 of the code of criminal procedure were, however, both relied on to sustain the conviction and sentence.

The act of February 17, 1885, expressly repealed title 1, chapter 31, miscellaneous laws, that title—title 1, chapter 31, miscellaneous laws of Oregon, so called—as printed in the compilation made by Matthew P. Deady and Lafayette Lane under the act of October 22, 1872, contained, except as as hereinafter noted, title 1, chapter 28, miscellaneous laws, compilation of 1864, 771. As to the latter compilation, see joint resolution, appendix, Session Laws of 1860, 4; Laws of 1862, 122; and governor's message of 1864, 13, and of 1865, 8.

Taking the compilation of 1864 as authoritative, and as the starting point, we find that said chapter 28 of that compilation was made up of fifteen sections that have dwindled to eleven sections in title 1, chapter 31, compilation of 1872. A search after the four missing sections, 9, 10, 14, and 15, reveals 9, 10, and 14, as sections 685, 686, and 726 of the code of criminal procedure. Section 15 seems to have been wrought into section 2, chapter 21, miscellaneous laws, 612. Section 14, or 726 of the compilation of 1872, relied on by the state, although printed as section 726 of the code of criminal procedure is, as a matter of law, no part of that code, as will appear evident on a little consideration. The code of criminal procedure was an act introduced as senate bill No. 39 in the session of 1864, and after passing both houses was approved, according to the senate journal of that year, 205, October 26, 1864. Said section 726 was not then a part, nor has it since been added by the legislature as an amendment to that act. It could become a part of that code only by original enactment or by way of amendment. Now the legislature cannot delegate to a code commission power to amend the laws of the state. If the act of 1872 professed to do that, it was *ultra vires* and void. Acts of the legislature are records, and should be printed as recorded. General acts of parliament are always enrolled by the clerk of the parliament and are delivered over into chancery, which enrollment in the chancery makes

them the original record: King v. Arundel, Hob. 109. Here the original record of an act of the legislature is deposited in the office of the secretary of state. Now, were a party to plead and to recite section 726 as being section 726 of the code of criminal procedure, he must go out of court on a general demurrer, neither the roll of the act nor any amendment thereto showing any such section in it: Holland's Case, 4 Co., note *g*. So acts which upon the roll or record appear to be passed without the consent of the lords or the commons are not statutes: Com. Dig. Parl. R. 4. Courts *ex officio* take notice of a public act and are the triers of it if it be a statute or not: Holmes Com. Law, 15. It is evident, therefore, and there are additional reasons under our constitution by which the title of an act becomes part of the act, and the subject-matter must be within the title, that matter appertaining to one act cannot be transferred to another act except by appropriate legislation. Therefore section 726, so called, of the code of criminal procedure, remains a part of the act from which it was taken.

The question next arises whether it must be considered a part of title 1, chapter 31, repealed by the act of February 17, 1885. To answer this in the negative is attended with more difficulty, logically and otherwise, than might cursorily appear. If that title be simply the work of the code commission, unsupported by legislative sanction, no judicial notice can be taken of it. In that case the repealing clause would likely be an utter nullity. If, however, the contrary view be the correct one, which ought rather to be presumed, then what authority had the commission to put part of an act under the title and not the whole? Suppose the public printer were to print under the title of an act but part of an act. Afterwards, the legislature repeal the act by its title. The whole act would doubtless be repealed. The act of the commission may be not unlike that of the public printer in the case supposed. To consider this question fully, and to enter into all the inquiries into which it might lead would be difficult, and will be unnecessary when the present question may be decided on other grounds. Thus, much has been advanced to call attention to a condition of the statute-book by which public and private rights may be imperilled.

A comparison of the provisions of title 1, chapter 31, professed to be repealed by the act of February 17, 1885, will show that the former would have been and is repealed by the latter act, by implication, without any express repealing clause to that effect: U. S. v. Bennett, 12 Blatchf. 349. Section 10, 1864, or 726, 1872, is also in effect repealed, because the penalty it prescribes was for selling "without first having obtained a license agreeably to this title;" and the title is gone, and everything under it to which the penalty could apply. The penalty was for the violation of the old act, and cannot be applied to an offender who has not violated it. In its nature a penalty is an incident of the offense for which it is provided, and cannot stand separate from it. If, then, the old penalty shall apply to the new act, it is because the legislature have said that it shall apply to it. There is no express declara-

tion to that effect. It must arise, if at all, by implication. It is a rule in the construction of statutes, that incidents are always supplied by intendment, and that what is implied in a statute is as much a part of it as what is expressed. But these rules do not enable courts to supply defects in laws by a process which amounts to legislation. It proceeds upon the ground, says Dwarris, that the proposed addition is already necessarily contained, although not expressed, in the statute; in which case it is not less cogent, because not expressed. "A *casus omissus* can in no case be supplied by a court of law, for that would be to make laws:" Jones v. Smart, 1 T. R. 52. And in particular, under the common law—which Mr. Vaillant, in his preface to Dyer's Reports, says that our kings liked not because of its tendency to freedom—penal clauses are never supplied by intendment. "A penalty cannot be raised by implication, but must be expressly created and imposed," says Jarvis v. Estis, 2 Johns. 380. This case was cited and applied in Health Department v. Knoll, 70 N. Y. 530–536; Berry v. Ripley, 1 Mass. 167; Ferrett v. Atwill, 1 Blatchf. 156. Counsel for the defendant brought forward at the argument Commonwealth v. Kelliher, 12 Allen, 480, which in principle is the very case before us. Massachusetts Stat. 1864, c. 299, sec. 1, set out in the reporter's note, required, under a penalty, every owner or keeper of a dog to obtain a license. Afterwards, Stat. 1865, c. 197, was enacted on the same subject, and repealed the former act by implication, but provided no penalty. A complaint was made for keeping an unlicensed dog. The court held that the penalty prescribed by the previous statute could not be imposed. "It was in express terms confined to a violation of the provisions of that act, which has been repealed:" and see State v. Ashley, Dud. (Ga.), 188.

The answer to the next and last question in the case seems hardly less satisfactory and decisive. Section 753 provides that "whenever, by any law of this state, an act is declared to be a misdemeanor, and no punishment is prescribed therefor, the person committing the same, upon conviction thereof, shall be punished by imprisonment in the county jail not more than one year, or by fine, not more than five hundred dollars." Some expressions let fall in Commonwealth v. Kelliher, *supra*, suggest that possibly the section is not applicable to an offense like this. However that may be, the case may be disposed of on other grounds, in a few words. The act of selling, in this case, was, without doubt, at common law a misdemeanor. "In every case where a statute prohibited anything and doth not limit a penalty, the party offending therein may be indicted as for a contempt against the statute:" Crouthers's Case, Cro. Eliz. 655; The King v. Harris, 4 T. R. 202; United States v. Coolidge, 1 Gall. 453; 1 Bish. Crim. L. 237. Had the criminal code made the common-law rule a statutory rule also, the case would have been met; but as the case stands, disobedience to a statute, considered as a contempt, as which it was indictable only where the statute had provided no penalty, is not a statutory misdemeanor. As a misdemeanor at common law, no indictment will lie, because we have no indictable common-law offenses in this state: McArthur, J., in State

v. Vowels, 4 Or. 326. We may look to the common law for definitions of crimes, but not for the crimes themselves: United States v. Coolidge, 1 Gall. 488. The statute may as much be said to declare the act of selling without a license a felony as a misdemeanor. The court cannot declare which was intended, and could not have said so at common law, but could say at common law that disobedience to a statute was a contempt of the statute, and indictable as such. The denial of jurisdiction over common-law offenses to the courts of the United States seems to have led to the same result. Thus it is laid down in United States v. New Bedford Bridge, 1 Woodb. & M. 439, "that if congress does not declare particular acts to be offenses, and prescribe the extent of the punishment and place of trial, though the subject-matter is within the powers granted to the general government, no particular court has any right to try a person for doing these acts or affix any punishment to them, as every court under the general government is limited to the trial and punishment of such matters, and such only, as congress has been pleased to confide to it."

It follows that the judgment must be reversed.

LORD, J., concurring. It is unnecessary to consider the common-law definition of a misdemeanor, as our code has fixed its precise signification.

Section 753 is a general enactment, prescribing a certain measure of punishment for all misdemeanors for which no specified penalty is declared. As I understand it, the object of this section was to enable the legislature to declare various acts or omissions to the misdemeanors without the necessity of stating the punishment in each enactment. It affords a convenient mode for legislating upon minor offenses. All the legislature has to do is to declare that any person or persons doing or omitting to do certain acts, etc., shall be deemed guilty of a misdemeanor, and section 753 attaches and provides the penalty. It does away with the necessity of requiring in every case the legislature to affix its penalty to the act.

As the act known as the Keady law does not declare the person or persons doing or omitting to do the acts therein mentioned shall be deemed guilty of misdemeanors, section 753 cannot attach and provide the penalty.

PARMENTIER *v.* PATER.

Filed December 14, 1885.

DURESS—RELINQUISHMENT OF DEBT.—The relinquishment of a debt, effected by the use of coercive means against the creditor by the debtor, amounting to duress, is not valid, whether the party relinquishing is of sound mind or not.

THE SAME—RESTRAINT OR FEAR INCITED BY THREATS.—The relinquishment of a debt under a restraint or fear incited by threats that an impending calamity would befall the creditor unless he complied with the demands of the debtor is invalid, although the threats were vague, and the danger remote, if they were sufficient to accomplish their purpose.

APPEAL from the circuit court of Multnomah county. The opinion states the facts.

A. H. Tanner, for the appellant.

W. B. Gilbert, for the respondent.

THAYER, J. Appeal from a judgment of the circuit court for the county of Multnomah, rendered in an action brought in said court by the respondent against the appellant to recover the sum of three thousand dollars and interest, alleged to be due upon a promissory note executed by the appellant and Louise Pater, his wife, to Louis Parmentier in his life-time. The note was given April 2, 1883. The said Louis Parmentier died September 30, 1884, by suicide, and the respondent, who was his wife and was left his widow, was duly appointed administratrix of his estate. The respondent claimed that she was the owner of the said note, and that no part of it had been paid. The appellant claimed that the note was not given for value, but that he and the said Louis Parmentier executed each to the other two notes for the same amount, and that the note in suit was one of them; and that they were all voluntarily surrendered up September 25, 1884, by the mutual agreement of the parties. It appears that said note in suit was secured by a mortgage upon certain real property in Portland, executed by the appellant and wife to the said Louis Parmentier, and recorded in the office of the clerk of the county of Multnomah, and that the latter, on said twenty-fifth day of September, 1884, caused to be entered upon the margin of the record of said mortgage the following indorsement, to wit: "Receipt of six thousand dollars on within notes of the within mortgage is hereby acknowledged, this twenty-fifth day of September, 1884.

"(Signed) LOUIS PARMENTIER."

The following words were also appended thereto:

"Attest: I. H. SANDERS, Clerk.

"By F. HENSHAW, Deputy."

The respondent claimed in her reply to the answer, that said note was given for value, and that the execution of the said two notes by said Louis Parmentier to the appellant was procured by fraud, and certain threats made by the appellant to said Louis Parmentier, and that under great fear on account of the threats, and in great distress of mind that unsettled his reason, he signed said notes, and that no consideration passed therefor; that said Louis Parmentier surrendered up the note in suit to the said appellant, and caused said entry to be made upon said mortgage record, in consequence of the threats made by the appellant to him, and while in great fear and distress of mind therefrom, and while insane. The case was tried by jury, who returned a verdict in favor of respondent for the amount of said note, and upon which the judgment appealed from was entered. The appellant claims that the court committed error at the trial in refusing to nonsuit the respondent, in excluding the testimony of the witness John Lentz, and in giving and refusing instructions to the jury. After the jury was

impaneled the respondent's counsel called the respondent as a witness in her own behalf, and she gave the following testimony: Ques. You may state to the jury what you noted about the conduct, the mental conduct, of Louis Parmentier, your husband, along about the twenty-third or twenty-fourth of September last.

Ans. He wasn't himself at all; he hadn't eaten or drunken a thing, not even a cup of tea, for ten days before he took his life; he was nervous; he said to me, "Oh, my, all we have got is gone to Pater; there is no seeing what he will do;" I told him not to fear Pater; Pater couldn't hurt him; he couldn't eat, he couldn't sleep, he was nervous and excited and wasn't himself at all; both Pater and his wife had something to say in the other room, and when the store was opened, was talking to him; he came out very nervous, and Pater himself came up in the store and said: "Before I get through with you I will send you to Salem."

Said counsel then called the appellant as a witness, and asked him whether he had ever paid any money to L. Parmentier, or anybody else, on the note in suit, which he answered in the negative. Thereupon the respondent rested her case and the appellant made a motion for the nonsuit referred to. I think the court properly denied the motion for a nonsuit. The evidence submitted by the respondent was very slight as to its showing either duress upon the part of the appellant, or insanity upon the part of the said Parmentier, but it showed that the latter was evidently in a distressed state of mind, and that the former was endeavoring to coerce him in a matter that seriously affected him, and that the pressure was so great that he destroyed his own life five days thereafter. I think the jury could have justified, under the evidence and circumstances as the case then stood, in concluding that the surrender of the note and indorsement of the payment upon the mortgage were compulsory acts. Louis Parmentier was evidently a weak person, and the appellant apparently was pushing an advantage he seemed to have had over him which, it may be inferred, resulted in the cancellation of the obligation. I do not believe that the relinquishment of a debt under such circumstances is valid whether the party relinquishing it is insane or not. At least a jury might properly conclude that it was enforced against the will of the party. The surrender of the note and cancellation, in effect, of the mortgage, in order to have been legal, must have been voluntary acts upon the part of said Parmentier. He must have assented to them as freely as a party is required to assent to any contract to make it valid. But he evidently did not so assent. He was pressed to do it under an influence as potent as could possibly be brought to bear upon a human being. The result showed it. The strain was so great upon his nervous system that he sought relief in self-destruction.

It was claimed upon the argument that in order to constitute duress by threats they must be of such a character as are calculated to operate on a person of ordinary firmness, and inspire a just fear of injury. This is frequently said by courts and text-writers. Bouvier, in his law

dictionary, says it, but he immediately adds the
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gage were valid obligations. I have the right to
as that question was in issue, and the jury must,
of the court upon that point, have so found in

respondent. This view of the case obviates, I think, the effect of the alleged errors, conceding them to have been such. The instructions of the court went much further than necessity, and the tests of insanity it laid down may have been erroneous; but that could in no wise have prejudiced the appellant's defense. If it had been admitted at the trial that said Louis Parmentier was not, at the time of the pretended surrender of the note and satisfaction of the mortgage, insane, it would not have aided the defense in the least. It would not have followed that the appellant did not use illegal influence to secure the result, nor that said Louis Parmentier was not at the time laboring under great mental excitement and distress.

It might be answered that the question of Louis Parmantier's insanity was in issue. There is an allegation in the reply that such was the fact, but it was unnecessary to allege it in order to overcome the defense interposed. The matter set forth in the reply was sufficient without it, and it will be noticed that it was inserted in the averments as to his mental condition apparently to intensify it. The allegations are that "while in a state of great fear on account thereof (certain threats), and in great distress of mind that unsettled his reason," etc. Again: "that thereafter, in consequence of said threats and distress of mind therefrom, and while insane, the said Louis Parmentier, deceased, surrendered up said notes," etc. It was not a reply of *non compos mentis*, and I think it evident that the pleader only employed said words, "unsettled his reason," and "insane," to give more force to the allegation of fear and distress of mind. The gist of the reply was that the surrender of the note and indorsement of payment upon the mortgage record had been secured by unlawful means; that they were not the voluntary acts of said Louis Parmentier, and the allusion therein to his being insane was, in my opinion, intended as a kind of makeweight. The respondent did not attempt, as I can see, to establish it by proof. Her own testimony did not include the term "insanity." It merely showed a nervousness and excited state of mind at a particular time, and it could not reasonably be inferred therefrom that his reason had been dethroned. The question was not a material issue in the case; it was only incidental to the main issue; and if the court, in giving the instructions it gave in regard to it, did commit error, it was harmless. If the respondent had relied entirely upon the fact that said deceased was insane, and had given no evidence as to threats or menaces, my view might be different, but as the case stands I do not think the question was material. Under this view it is unnecessary to determine whether the refusal to allow the witness John Lentz to give his opinion as to said Louis Parmentier being sane or insane was error or not. The reasons already given showing the harmlessness of the instructions apply equally to that.

It only remains, therefore, to consider the correctness of the instruction given upon the question of duress, and of the one asked to be given by the appellant's counsel upon that subject and refused by the court. The one given is as follows: "If you find that the defendant,

by duress or threats, compelled the said Louis Parmentier to surrender up the note and satisfy it on the mortgage on record, and that the duress or threats, if any there were, were such as to influence and did influence the action of the plaintiff's intestate, and were the moving cause of his action in surrendering up the note, then there was no valid surrender of the note or mortgage, and the plaintiff is entitled to recover." And the one asked to be given by the appellant's counsel is as follows: "1. Where duress is relied upon to avoid a contract, or to relieve one from the legal consequences of his act, there must be something more than the mere whim or caprice of a weak or cowardly nature, but it is such actual fear, based upon sufficient reason to move and intimidate a man of reasonable courage. Mere threats of criminal prosecution and indictment do not constitute duress without threats of immediate imprisonment. Threats to prosecute upon a criminal charge but not importing a purpose to use the process in an illegal or oppressive or unusual manner, are not duress, and it must appear to your satisfaction that the threats, if any were made, influenced the action of the plaintiff's intestate and actually caused him to surrender up the note sued on."

The instruction given was clearly correct, assuming, as I have before indicated, that the note was a valid outstanding obligation. If the appellant was on said twenty-fifth day of September, 1884, actually indebted to the said Louis Parmentier in the said sum of three thousand dollars, and he influenced him, in the manner suggested in the instruction, to surrender up the evidence of the debt, he most certainly could not claim that it had been satisfied; such a case differs entirely from one where a party has been coerced to pay or secure a just claim. In the latter case there is another cause for paying the money or giving the security, and the law would doubtless recognize that as the moving cause, unless it clearly appeared that the party was actually compelled to do it by a well-grounded apprehension of the loss of liberty, life, or limb. The instruction asked by appellant's counsel and refused by the court might be applicable to cases of that character, but it should not be applied where there is no other cause for doing the act. There any threats, even if slight injury, will invalidate the contract. Persons of "weak or cowardly nature are the very ones that need protection. The courageous can usually protect themselves. Capricious and timid persons are generally the ones that are influenced by threats, and it would be great injustice to permit them to be robbed by the unscrupulous because they are so unfortunately constituted. The important question in the case was whether the appellant was indebted to Louis Permentier as testified to by the respondent. If it be true that he was so indebted then he should have paid it, notwithstanding he had succeeded by artifice in securing a surrender of the evidence of the debt. That a person should in such a case be allowed to profit by his own wrong would be a monstrous proposition.

Judgment affirmed.

DURESS, WHAT IS: See Mayor v. Lefferman, 45 Am. Dec. 145, and note 153; Moore v. Adams, 32 Id. 723; Eddy v. Herrin, 35 Id. 261; Alston v. Durant, 49 Id. 596.

No. 9,628.

REYNOLDS *v.* LINCOLN ET AL.

Department One. Filed December 28, 1885.

ACTION TO QUIET TITLE—PARTIES—AMENDMENT.—The complaint in an action brought under section 738 of the code of civil procedure to quiet title to land, is to be treated as a bill in equity. In such action, one who holds the legal title to the premises in dispute, without any beneficial interest therein, is a proper party to a final determination of the controversy, and may be brought in as a party defendant by an amendment to the complaint.

THE SAME—MISJOINDER OF CAUSES OF ACTION—DEFENDANT SUED AS TRUSTEE.—Several causes of action cannot be united in the same complaint unless they are each included within one of the several classes designated in section 427 of the code of civil procedure. Consequently a cause of action relating to the recovery of real property cannot be united with a cause of action against a defendant as a trustee, by virtue of a contract or by operation of law. The joinder of such causes of action is error prejudicial to the defendants, when the evidence given and findings made were adapted to meet the issues under the cause of action improperly joined.

THE SAME—ANSWERING DOES NOT WAIVE DEMURRER FILED.—If a complaint improperly joins two causes of action, advantage of the defect must be taken by demurrer, or it is waived. If such demurrer be improperly overruled, the defendant does not waive the defect by answering.

APPEAL from a judgment of the superior court of Sacramento county, entered in favor of the plaintiff. The opinion states the facts.

Freeman & Bates, and *McKune & George*, for the appellant.

John Reynolds, for the respondent.

SEARLS, C. This action was originally brought under section 738 of the code of civil procedure, to quiet title to the premises described in the complaint.

Plaintiff applied to the court for leave to file an amended complaint, in which Francis E. Lynch was made a party defendant, and in which another and separate cause of action was set out, in addition to that in the original complaint. This leave was granted.

Defendant Lincoln excepted to the order making Lynch a party, and demurred to the amended complaint upon the grounds of a misjoinder of parties defendant, and an improper joinder of causes of action.

The demurrer was overruled by the court, and its action is assigned as error.

1. As to the alleged improper joinder of parties defendant. The amended complaint shows that the grantors of plaintiff and defendant Lincoln, in 1863, conveyed the premises in question to defendant Lynch, and one Martin, in trust, to be sold, and the proceeds to be divided among the grantors and a railroad company about to be organized, in certain proportions as in the trust deed specified.

The deed provided that it should become void if the railroad should not be built within two years from the date of such deed.

The complaint avers that the railroad was never built, that Martin has since died, and that neither he nor Lynch have ever conveyed the property to anyone.

A complaint under section 738 of the code of treated as a bill in equity: Brandt v. Wheaton,

The allowance of amendments is largely in court, and unless it clearly appears that suc abused, to the prejudice of the party complain interfere.

Lynch held the legal title to the premises in beneficial interest therein, and was a proper pa ation of the controversy.

"It is the constant aim of a court of equity by deciding upon and settling the rights of all the subject of the suit, to make the performar court perfectly safe to those who are compelled vent future litigation. For this purpose all pe ested in the subject ought generally to be parti or defendants, however numerous they may be, be enabled to do complete justice by deciding rights of all persons interested:" Mitford's Pl. 1(

It may and frequently does occur that in co having very different and even opposite inter defendant.

It is the great object of courts of equity to p and to settle, if possible, in a single suit the righ interested or affected by the subject-matter in Eq. Jur., sec. 1526.

In Jenkins v. Frink, 30 Cal. 586, it was held one of several *cestuis que trust* to declare and er in relation to land, all the beneficiaries, or tho are proper parties defendant.

The case of Reynolds v. Lynch et al., deci reported in 64 Cal. 442, 1 West Coast Rep. 344,

In that case the action was against Lynch as of certain land under a deed of trust, and the not shown to have any interests, except as ten the trustee, and this court held, in sustaining a plaint, that their possession as tenants at will proper or necessary parties defendant; such t said, could be terminated by plaintiff at any deed from the trustee.

We are of opinion there was no error in p made a party defendant, and that that portion upon an improper joinder of parties defendant

2. Was there an improper joinder of causes amended complaint?

The first count of the amended complaint av session of the premises in question in plainti the usual manner to aver that the defendar "claim some estate or interest in the said premi

tiff, ... but which plaintiff avers is unfounded, and that said defendants have no estate, right, or title, either at law or in equity, in or to said premises," etc. This is a cause of action to quiet title under section 738 of the code of civil procedure.

This form of action is provided for under the chapter relating to "actions to determine conflicting claims to real property, and other provisions relating to actions concerning real estate."

By section 427 of the code of civil procedure "the plaintiff may unite several causes of action in the same complaint where they all arise out of," etc., and then follow seven distinct classes, after which the section proceeds as follows: "The causes of action so united must all belong to one only of these classes, and must affect all the parties to the action."

The fourth subdivision in the section relates to causes of action upon "claims against a trustee, by virtue of a contract or by operation of law."

The cause of action set out in the first count of the complaint must fall under either the second subdivision of section 427, relating to the recovery of real property, or under the seventh subdivision of the same section, and cannot be held to be within the purview of the fourth subdivision.

The second cause of action sets out that in 1863 certain parties were owners of the premises; that Robert H. Vance claimed some equitable interest therein; that Crouse and Hoyt were in possession, but without title; that all of said parties, with others, united in the execution of a deed of trust, for certain specific purposes, to defendant Lynch and one Martin as trustees; that the objects of the trust have failed; that Martin, one of the trustees died; that defendant Lincoln has succeeded to any interest Crouse and Hoyt ever had in the premises, and that plaintiff holds the entire estate of all the other beneficiaries under the trust deed. He seeks to have defendant Lynch, the surviving trustee, convey to him, etc.

This last count is essentially a cause of action against Lynch, as a "trustee, by virtue of a contract, or by operation of law," and as such must be classed under the fourth subdivision of section 427 code of civil procedure.

As causes of action coming under these different classes cannot be united in the same action, we think there is a misjoinder of causes of action in plaintiff's amended complaint, and that the demurrer for misjoinder should have been sustained.

Respondent claims that by answering the complaint after his demurrer for misjoinder was overruled defendant has waived the error, if any, and cites Sankey v. Wells, 16 Nev. 271, and Hammersmith v. Avery, 1 West Coast Rep. 662, in the same court, in support of his contention.

These cases sustain the position of respondent, and the earlier cases in this court were to the same effect: De Boom v. Priestly, 1 Cal. 206; Pierce v. Minturn, Id. 470; Brooks v. Minturn, Id. 481.

The cases seem to proceed upon the theory that if a demurrer to a

complaint be overruled, the demurrant, if he wishes to make an issue of fact, should ask leave to withdraw his demurrer and make an issue of fact by filing an answer, and that an answer by leave will be treated as such withdrawal: Fisher v. Scholte, 3 Iowa, 221.

The injustice of this rule under our code must, we think, on examination be apparent.

If a complaint improperly joins two causes of action, advantage must be taken of the defect by demurrer, or it is waived.

Suppose a demurrer in such a case is interposed and improperly overruled. A defendant thus situated may hesitate to rest upon his demurrer lest an error of judgment on his part imperil his case, and shut him out of a meritorious defense. If, however, he answers, he is, under this rule, forever precluded from availing himself of an error which may have worked him great injustice.

It is proper to say that merely formal defects in a pleading are waived by pleading over after demurrer overruled, but as to those which affect the substantial rights of the parties, there is no inherent justice in holding a party to have waived error by pleading after a demurrer interposed by him has been overruled, and such has not been the later practice of this court.

As early as 1857, in Bigelow v. Gove, 7 Cal. 133, a judgment upon the merits was reversed on account of the erroneous overruling a demurrer to a complaint, which improperly joined two causes of action. In Dyer v. Barstow, 50 Id. 652, and Brown v. Rice, 51 Id. 489, demurrers for improper joinder of causes of action were interposed, overruled, answers filed, and judgments rendered, which were by this court reversed upon the ground of error in overruling the demurrers.

The theory that a party whose demurrer was overruled was deemed upon an answer filed to have withdrawn the demurrer, was, under our system of pleading, but little more than a fiction, and when the code was so amended that a party could both demur and answer at the same time it became time to disregard this fiction in the interests of justice.

It is next objected that if it be conceded that the court below should have sustained the demurrer, and that the error has not been waived, the judgment should not be reversed, because appellant was not injured thereby. That the case was tried upon the first cause of action, etc.

We recognize the doctrine that error without prejudice is not a ground for reversal: Code Civ. Proc., sec. 475.

It seems to us, however, as we scan the testimony, that much of it applies to each of the causes of action, and that the facts as found by the court are, a portion of them, peculiarly adapted to meet the issues made under the second cause of action.

Under such circumstances injury must be presumed to have followed upon the error of the court in overruling the demurrer, based upon the ground that two causes of action were improperly united, and for this error the judgment and order should be reversed and the court below directed to sustain the demurrer to plaintiff's amended complaint,

upon the second cause or ground therein specified, viz., that two causes of action have been improperly united.

BELCHER, C. C., and FOOTE, C., concurred.

By the COURT. For the reasons given to the foregoing opinion the judgment and order are reversed and cause remanded with direction to the court below to sustain the demurrer to plaintiff's amended complaint.

DEMURRER FOR MISJOINDER OF CAUSES OF ACTION IS WAIVER, in Colorado and Nevada, if the defendant afterwards pleads over: Schollekopf v. Leonard, 5 West Coast Rep. 786; Hammersmith v. Avery, 1 Id. 662; but an objection that the complaint does not state facts sufficient to constitute a cause of action is not: Hall v. Linn, Id. 394; and may be taken in the supreme court for the first time: Caldwell v. Ruddy, Id. 295. An objection that two causes of action are improperly united in one count cannot be taken by demurrer: Bernero v. Ins. Co., 3 Id. 292. Objection to misjoinder is waived unless taken by demurrer: Learned v. Castle, 3 Id. 154.

No. 9,239.

GEORGE *v.* SILVA.

Department One. Filed December 28, 1885.

EJECTMENT—ANSWER SETTING UP EQUITABLE DEFENSE—WAIVER OF TRIAL OF.—Where a defendant, whose answer in an action of ejectment sets up an equitable defense, does not ask that such defense should be first tried, but assents to a trial of the whole cause, he cannot object, after trial, because the equitable defense was not first tried before entering upon a trial of the issues of law.

PRIVILEGED COMMUNICATIONS—STATEMENTS MADE TO MEMBER OF BAR.—Statements made by parties to the action to a member of the bar, who is not their attorney or legal adviser, are not privileged communications.

THE SAME—COSTS—JUDGMENT FOR PLAINTIFF—UNPREJUDICIAL ERROR.—One who, on application of the defendant, is joined as a party plaintiff, and as such answers a cross-complaint in an action of ejectment, is entitled to a judgment for costs upon findings being made in his favor. And it is error for the court to add such costs to the amount of the cost-bill of the original plaintiff, and to enter judgment for the full amount against the defendant. Such error will not warrant a reversal of the judgment, as it is without prejudice to the defendant.

APPEAL from a judgment of the superior court of San Benito county, entered in favor of the plaintiff, and from certain orders entered against the defendant. The opinion states the facts.

Briggs & Hawkins and *McCroskey & Hudner*, for the appellant.

W. G. Lee, Burchard & Cothran, and *G. B. Montgomery*, for the respondent.

SEARLS, C. This is an action of ejectment to recover possession of certain rooms, or portion of a house and lot in Hollister, county of San Benito.

Plaintiff had judgment, and defendant appeals as well from the judgment as from an order denying a motion for new trial, and from an order refusing to strike out costs.

The complaint counts upon a lease to defendant by one Maria Lenar Serpa, the grantor of plaintiff, for a term of five years, from April 15, 1882, at a nominal rent of one dollar per year. The lease contained a proviso that the lessor should have the right at any time to sell the property, and upon such sale being made the lease was to become void, and defendant was to deliver up and surrender the property at once.

The complaint avers a sale of the property to plaintiff, demand, and refusal of defendant to surrender possession, etc.

The answer, after denying most of the allegations of the complaint and attacking the good faith of the purchase by plaintiff, proceeds by way of cross-complaint to set out that the property was purchased in part with the funds of defendant, and a deed taken in the name of Maria Lenar Serpa, for the joint benefit of herself and defendant, and avers an equitable title in defendant to the extent of one half of the premises, and seeks to have a trust in defendant's favor declared to the extent of said one half of the premises.

Maria Lenar Serpa, who has since intermarried with one Benevides, was, on petition of defendant, made a party to the action.

The answer contains some matters not important to the ownership of the property.

The cause was tried by the court, a jury having been expressly waived. No demand being made for a trial as to the equitable defenses set up, the whole was tried together, and the facts as found are in favor of plaintiff and against defendant upon all the material issues presented by the complaint and answer and cross-complaint and answer thereto.

Defendant cannot, after having been silent when he should have spoken, and after having thus assented to a trial of the whole cause, be heard after trial, to urge that the equitable defense should have been first tried. His conduct amounted to a waiver of his right to have the court test the merits of his equitable defense, before entering upon a trial of the issues of law.

There was no error in the ruling of the court permitting W. G. Lee to testify. He was not the attorney or legal adviser of the parties, and what was said to him by them or either of them did not constitute privileged communications.

There was ample evidence to support the findings, and the errors complained of at the trial are either not valid, or upon questions of no importance, the merits considered.

Mrs. Benevides was, on the application of defendant, made a party plaintiff, and as such answered the cross-complaint of defendant. The findings were in her favor, and she was entitled to have and recover her costs of suit against the defendant.

She filed her cost-bill in due time, which the court refused on motion to strike out, and ordered the clerk to add the amount thereof, fifty-five dollars and fifty cents, to the cost-bill of plaintiff, and to enter judgment for the full amount against defendant, to which action counsel for defendant excepted in due form, and appeals from such order.

The course pursued by the court was erroneous. A judgment in her favor for her costs was the proper course to pursue.

But as this was an error by which appellant, who ought to pay her costs, cannot suffer, the judgment will not for that cause be reversed.

"When the judgment plainly appears by the record to be right, it will not be reversed for a technical error which could not possibly have worked any injury to the plaintiff in error:" Mobile & Mont. R. R. v. Jurey, 111 U. S. 593; Code Civ. Proc., sec. 475.

To modify the judgment by directing the court below to so amend it as to make the judgment for the costs of Mrs. Benevides payable by the defendant to her instead of to the other plaintiff, would be technically correct, but would not in the least benefit the defendant.

The judgment and orders appealed from should be affirmed.

BELCHER, C. C., and FOOTE, C., concurred.

By the COURT. For the reasons given in the foregoing opinion the judgment and orders are affirmed.

EQUITABLE DEFENSES MAY BE INTERPOSED IN EJECTMENT: Arguello v. Boura, 7 West Coast Rep. 498.

IRREGULARITY IN MODE OF TRIAL, WHEN WAIVED: See Myers v. McDonald, 8 West Coast Rep. 337; Boston T. Co. v. McKenzie, 7 Id. 780.

No. 9,069.

ROBERTS ET AL. *v.* DONOVAN ET AL.

Department One. Filed December 28, 1885.

COUNTER-CLAIM IN FAVOR OF ONE DEFENDANT—ACTION ON JOINT LIABILITY.—One of two or more defendants sued on a joint and not a joint and several liability, cannot set up as a counter-claim a cause of action in his favor alone against the plaintiff.

APPEAL from a judgment of the superior court of the city and county of San Francisco, entered in favor of the defendants, and from an order denying the plaintiffs a new trial. The opinion states the facts.

George D. Shadburne, for the appellants.

E. P. Cole and *A. N. Drown*, for the respondents.

SEARLS, C. On the twenty-ninth day of July, 1878, plaintiffs and defendant Thomas D. Tobin entered into an agreement in writing by which Tobin became the agent of plaintiffs in San Francisco for the sale of their bricks, in such quantities as they might deem it for their interest to furnish, said Tobin to sell on commission, and to charge usual and customary commissions. Tobin was to account to and pay over from time to time to H. L. Miller, agent of plaintiffs, all moneys by him collected on account of bricks sold, etc.

Defendants Donovan and McGrath, as sureties, and Tobin as principal, executed to plaintiffs a joint bond in the sum of ten thousand

dollars, gold coin, conditioned for the faithful performance by Tobin of his contract with plaintiffs.

This action is brought to recover three thousand six hundred and sixty-two dollars and twenty cents on the bond, for the failure by Tobin to account and pay over moneys by him, averred to have been collected on sales of brick.

Defendant Donovan set up a counter-claim against plaintiffs for four thousand five hundred dollars, claimed as due Tobin on the brick transaction, and by him assigned to Donovan before suit was brought.

The cause was tried by the court, who filed written findings, upon which defendants had judgment for their costs, except defendant Donovan, who had judgment on his counter-claim for two thousand two hundred and sixteen dollars and eighty-two cents, and costs of suit.

The cause is brought here on appeal by plaintiffs from the final judgment, and from an order denying a new trial.

The trial of the cause involved an investigation of lengthy and somewhat complicated accounts, and as there was evidence tending to support the result arrived at, we cannot assume to disturb the findings of fact. This being true, the respondent does not need, and the appellants would hardly appreciate the reasons for the conclusion at which we have arrived as to the facts, were we to give them *in extenso*.

The point is made by appellant that the balance claimed to have been due to Tobin, by him assigned to Donovan, and for which judgment was rendered in favor of the latter, was not a legitimate counter-claim in this action.

A counter-claim, to be available in an action, "must be one existing in favor of a defendant and against a plaintiff, between whom a several judgment might be had in the action, and arising out of one of the following causes of action: 1. A cause of action arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action; 2. In an action arising upon contract; any other cause of action also arising upon contract and existing at the commencement of the action: Code Civ. Proc., sec. 438.

It must exist in favor of the defendant and against the plaintiff: Chase v. Evoy, 53 Cal. 348.

A defendant cannot set up a counter-claim existing in favor of another person.

The test is, whether defendant could have maintained an independent action on the demand: Belleau v. Thompson, 33 Cal. 495.

A surety cannot set up a counter-claim existing in favor of his principal against the plaintiff: Gillespie v. Torrance, 25 N. Y. 306; nor can a counter-claim in favor of a defendant and a stranger to the action be set up: Hook v. White, 36 Cal. 299; or a claim against the plaintiff and another person: Howard v. Shores, 20 Id. 277; Hobbs v. Duff, 23 Id. 627.

In the present case Donovan and McGrath were joint obligors upon a bond with Tobin. The latter had a claim against plaintiffs, growing

out of transactions under the contract for the faithful performance of which they had become sureties. Tobin assigned his claim to Donovan, one of the sureties, and his right to recover thereon is the precise question presented.

The term counter-claim is broader in its scope and meaning than set-off, and includes not only demands which were the subject of set-off and recoupment, but also in our state equitable demands. A set-off, prior to the code, could in most of the states only be interposed where the demand was certain, or capable of being made certain by calculation, and could not be sustained for unliquidated damages in a court of law.

The defense of recoupment was one in which the defendant was permitted in an action upon a contract, to show that by reason of some failure of the plaintiff on his part to perform his cross obligations under the contract, defendant had suffered damage, which he was permitted to discount, keep back, cut off, or recoup to the extent of his damage, but not exceeding the demand of plaintiff on the same contract. This defense was allowed at law, usually, but not always, by virtue of some statutory provision; its object being to avoid circuity of action. If a defendant failed to recoup damages where he might do so, he was afterward precluded from maintaining an action therefor, as he is now, by our code, for counter-claims arising under subdivision 1 of section 438 of the code of civil procedure. A counter-claim under said subdivision includes a cause of action arising out of the transaction set forth in the complaint, as the foundation of the plaintiff's claim or connected with the subject of the action.

It has been held in New York, under a statute precisely like our own, that the term "transaction" is a broader one than "contract." A contract is a transaction, but a transaction is not necessarily a contract: Xenia Branch Bank v. Lee, 7 Abb. N. Y. Pr. 372.

We do not, however, deem it necessary to enter upon a discussion of the distinctions between the several cases provided for by subdivisions 1 and 2 of section 438 of the code of civil procedure, for the manifest reason that the counter-claim set up by defendant Donovan must come under one or the other of those provisions; and, for the purposes of the decision, it matters not which. If the counter-claim cannot be sustained, it must be for the reason that a several judgment cannot be had between defendant Donovan and plaintiffs.

The action is brought upon the joint bond of all the defendants. Were it a joint and several bond, no difficulty could arise; for where the cause of action is several as well as joint, a several judgment may be entered, without reference to the mere form of action.

So, too, when the cause of action is against several defendants jointly, a portion only of whom are served, judgment may be taken against those served, under section 414 of the code of civil procedure, and proceedings may afterward be had in such cases against those not served, under section 989, etc., of the code of civil procedure. And under section 1543 of the civil code the release of a joint debtor does not discharge others.

It is submitted, however, that where all of se
sued and served with process, all being equall
exceptional cases, of which this is not one, a se
be entered, but the judgment, like the demand,

Pomeroy, after discussing at considerable leng
arising under counter-claims, at section 761 of
sums up as follows: "1. When the defendants
contractors, and are sued as such, no counter-cla
able which consists of a demand in favor of on
When the defendants, in an action, are jointl
although sued jointly, a counter-claim, consistin
of one or some of them, may, if otherwise with
posed."

We think this to be the true rule, applicabl
present case, and that under it the several deman
a proper counter-claim in the action against him
upon a joint demand against them all.

Springer v. Dwyer, 50 N. Y., 19 cited by cc
is not in conflict with the rule as stated. Tha
promissory note against the maker and indorse
liable to plaintiff.

People v. Cram, 8 How. Pr. 151, was a case
liability.

Persons v. Nash, 8 How. Pr. 455, was also a ca
liability, and it was expressly held that where
liability, a defendant severally liable could avail
his favor.

We know of no well-considered case in which
one of two or more defendants jointly, and not
liable, has been permitted to set up a counter-cla

It sometimes occurs that the very facts consti
may be and are a defense to the action, to the e
plaintiff's right to recover. In such cases and
doctrine we have advanced, so far as the defens
application.

It follows that the objection to the counter-c
court below should have been sustained, and th
order denying a new trial should be reversed an

BELCHER, C. C., and FOOTE, C., concurred.

By the COURT. For the reasons given in the
judgment and order are reversed and the caus
trial.

No. 11,127.

COLLINS *v.* LEAN.

Department One. Filed December 28, 1885.

WARRANT TO SEARCH PERSON—ISSUANCE OF—WHEN AUTHORIZED.—Neither article 4 of the amendments to the United States constitution, nor section 19 of article 1 of the state constitution, prohibit the issuance of a search-warrant of the person of an individual in a proper case. Therefore, subject to the limitations of those constitutions, and subject to the limitations that body may itself prescribe, it is within the power of the legislature to authorize the issuance of such a warrant. This power has been exercised by the enactment of sections 1523 to 1542, inclusive, of the penal code.

THE SAME—PROPERTY MAY BE TAKEN UNDER, ALTHOUGH NOT ON PERSON—LOTTERY-TICKETS.—Under a warrant, regularly issued, authorizing an officer to make immediate search of the person of an individual for lottery-tickets, and if any were found to bring them before the justice of the peace issuing the warrant, the officer may, in the execution thereof, take and remove lottery-tickets, the property of and in possession of the person against whom the warrant was directed, although the same were not found on his person.

THE SAME—PRESUMPTION THAT PROPERTY TAKEN IS DELIVERED TO MAGISTRATE.—It is presumed, in the absence of a showing to the contrary, that the officer who so takes possession of such lottery-tickets delivers them to the magistrate as commanded by the search-warrant. Having done so, the tickets are not in law in the custody of the officer, or under his control, but in that of the magistrate, under section 1536 of the penal code, subject to the order of the court, to which the proceedings before him must be returned.

POLICE POWER—RIGHTS OF PROPERTY SUBJECT TO—All rights of property are held subject to such reasonable and proper control of the mode of its keeping and use as may be deemed necessary for and in consonance with the welfare of the general public. And in the exercise of the police power vested in the legislature certain kinds of property, when held or used so as to be injurious to the general public, may be seized and destroyed. Under article 4, section 26, of the constitution, sections 319 to 326, inclusive, of the penal code, and order No. 1587 of the board of supervisors of the city and county of San Francisco, such rule has been extended to the sale and possession of lottery-tickets.

APPEAL from a judgment of the superior court of the city and county of San Francisco, entered in favor of the defendant, in an action brought to recover damages. The opinion states the facts.

R. M. Swain, for the appellant.

Alfred Clarke, for the respondent.

FOOTE, C. This is a controversy submitted without action, under section 1138 of the code of civil procedure, and from the judgment therein rendered, which was in favor of the defendant, an appeal is prosecuted under section 1140 of the code of civil procedure.

It appears from the agreed statement of facts that on the third day of April, 1885, Collins, the plaintiff, was a merchant, residing and doing business as such in the city and county of San Francisco, and the defendant a duly appointed, qualified, and acting police officer, of said city and county.

That E. Burke was then and there a duly elected, qualified, and acting justice of the peace in and for said city and county.

That on the day above mentioned the defendant, acting upon the information which he had received from one Handly that the plaintiff had sold him (Handly) a lottery-ticket on that day in said city and county, and was then and there engaged in the business of selling lottery tickets to divers persons, applied to E. Burke, as justice of the

peace aforesaid, for a search-warrant to be used for the purpose of searching the plaintiff's person; that the deposition which he then and there made in due form and filed with said justice, contained *inter alia* this statement: "That on the third day of April, A. D. 1885, at said city and county, certain tickets in the Louisiana State Lottery were upon the person and in the possession of plaintiff, with intent to use the same as the means of committing a public offense, viz., selling them for money," and prayed for a warrant to search for the same.

That on such making and filing of said deposition, E. Burke, as justice of the peace aforesaid, issued under his hand a search-warrant in due form of law, directed (among others) to any policeman of said city and county, requiring them to make immediate search of the plaintiff's person for such lottery-tickets, and if any such were found, to bring them before him.

That on the same day upon which said warrant was delivered to him, with instructions to serve the same, and subsequent to such delivery and instructions, the defendant did search the person of the plaintiff, but failed to find any lottery-tickets. But that after such searching and before he left the room or place where such search was made, he discovered a package of one hundred such tickets, all of which were the property of and in the possession of the plaintiff; that the defendant took and carried them away for the purpose of using them as evidence against plaintiff in a future prosecution, on the charge of aiding in and getting up and drawing a lottery. That he had no warrant to search the store of plaintiff, nor did he search the same. That after such event the tickets were no longer required as evidence, and plaintiff demanded that they be returned to him, which defendant refused, on the ground that they should be retained to prevent plaintiff from committing a public offense, viz., selling them.

It is urged by the appellant that the judgment of the court below was erroneous, for the reason that defendant could not legally apply for and obtain the search-warrant, because he had no personal knowledge of the facts showing, or tending to show, that plaintiff had, or was about to commit a public offense.

That the warrant was invalid, and the defendant had no right to take the tickets from plaintiff's store, as the warrant did not name it as the place to be searched, but specified that the search must be of the plaintiff's person.

That the plaintiff, who claimed the lottery-tickets as his property, could not be deprived thereof without due process of law, and therefore the defendant could not lawfully retain them for the purpose of preventing the commission by the plaintiff of a public offense.

The defendant was informed that the plaintiff had the tickets in his possession; he was an officer of the law, whose plain duty it was to suppress crime if he lawfully could; he acted on this information in good faith, believing it to be true, and the result showed his belief to be well founded. The fact that the tickets when found were under the counter in the room where the plaintiff then was, and where he

did business, did not render it at all improbable that upon perceiving himself the object of suspicion, he had, subsequent to the issuance of the warrant, and before being searched, removed the tickets from his person and thrown or placed them where they were found. And the officer was undoubtedly justified in making the complaint and obtaining the warrant.

Under article 4 of the amendments to the constitution of the United States it is provided that no search-warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or things to be seized. To the same effect is section 19 of article 1 of our state constitution.

As we read those instruments, we do not find existent therein any prohibition against the issuance of a search-warrant of the person of an individual in a proper case. Therefore, subject to the limitations of those constitutions, and subject also to the conditions that body may itself have prescribed, it is within the power of our state legislature to authorize the issuance of such a warrant. And this power it has exercised by the enactment in the penal code of sections 1523 to 1542 inclusive.

The deposition upon which the warrant was issued, and the warrant itself, are in due form of law, and conform both to constitutional and statutory requirements.

The warrant was therefore valid, and authorized the defendant to execute it. Although it did not authorize the defendant to search the store or premises of the plaintiff, it did authorize him to seize the lottery-tickets specified therein, if found in the plaintiff's possession.

The agreed statement of facts shows the tickets which are the subject of this action, and taken by the defendant, and which may be presumed to have been removed by the plaintiff from his person and placed where found, after the issuance of the search-warrant, were the plaintiff's property, and in his immediate possession, and that defendant made no search for them anywhere, save on the plaintiff's person.

To admit that he could not take them into his possession under such circumstances would be to say that the plaintiff, after he saw the defendant coming into his store, might have stepped to the back of his counter, taken the tickets out of his pockets secretly and dropped them thereunder, and the defendant would not have been authorized, even when searching the plaintiff, at that spot, to stoop down and pick them up.

Conceding all that the plaintiff claims as to the tickets being his property, and that he cannot be deprived of them as such without due process of law under most circumstances, yet, nevertheless, it is firmly settled by the law that all rights of property are held subject to such reasonable and proper control of the mode of its keeping and use as may be deemed necessary for, and in consonance with, the welfare of the general public. And in the exercise of the police power vested in the legislature, under our state constitution, certain kinds of property, when held or used so as to be injurious to the general public, may be seized and destroyed.

Under article 4, section 26, of that constitution, the legislature is prohibited from authorizing lotteries for any purpose, and is directed by that clause, which is mandatory upon it, to pass laws prohibiting the sale of tickets for anything in the nature of a lottery. That body has acted in the premises, as shown by the sections of the penal code, 319 to 326 inclusive, and by order No. 1587 of the board of supervisors of the city and county of San Francisco the mere possession of such tickets is made a misdemeanor, and all such laws should receive a liberal construction, with a view to carry out the constitutional policy.

The defendant, therefore, was right in taking the tickets before the magistrate as commanded by the search-warrant, under sections 1523, 1529, penal code, and he is presumed to have done so in the absence of any showing to the contrary. Having so done, they are not in law in his custody or under his control, but in that of the magistrate, under section 1536, penal code, subject to the order of the court to which the proceedings before him must be returned.

The acts of the defendant complained of being in accordance with law, the plaintiff has no cause of action against him, and the judgment of the court below should be affirmed.

BELCHER, C. C., and SEARLS, C., concurred.

By the COURT. For the reasons given in the foregoing opinion the judgment is affirmed.

SEARCH-WARRANTS, JUSTIFICATION OF OFFICER UNDER: See Chipman v. Bates, 40 Am. Dec. 663, and note 666.

No. 8864.

McNALLY ET AL. v. CONNOLLY.

In Bank. Filed December 29, 1885.

ACTION FOR POSSESSION OF PERSONALTY—DEMAND WHEN NECESSARY.—In an action to recover personal property, or its value, where it appears that the property came lawfully into the possession of the defendant, a demand and refusal to deliver must be shown. If the original possession is acquired by tort, no demand previous to the institution of the action is necessary.

THE SAME—DEMAND WHEN NECESSARY BY JUDGMENT PURCHASER.—Judgment debtors whose real property has been sold under execution may lawfully retain possession thereof, after the time for redemption has expired, until the execution purchaser has demanded to be let into possession. And until such demand the execution purchaser cannot maintain an action to recover possession of fixtures removed by the judgment debtors.

APPEAL from a judgment of the superior court of the city and county of San Francisco, entered in favor of the defendant, and from an order denying the plaintiffs a new trial. The opinion states the facts.

Charles F. Hanlon and *W. C. Flint*, for the appellants.

M. Mullany, for the respondent.

SEARLS, C. This is an action to recover possession of certain personal property if possession can be had, and if not, the value thereof.

Defendant had judgment, from which, and from an order denying a new trial, plaintiffs appeal.

In 1876 Owen Connolly, the defendant, took a lease of a lot of land on Fourth street, near Berry, in the city of San Francisco, for a term which was to expire January 1, 1881. There was a brick building upon the lot, but which did not cover the whole of it. Connolly paid his rent in full for the term, formed a copartnership with Charles D. Wheat, and as such copartners, under the firm name of Connolly & Wheat, they proceeded to place upon said lot of land an engine, boiler, and machinery for a flouring-mill, which machinery is the subject-matter of the controversy in this action.

The engine and boiler were erected in a wooden building adjoining the brick structure, and the motive power was communicated therefrom to the machinery by means of a shaft, or shafts, extending into and through the brick structure.

The foundation for the engine and boiler was made by sinking timbers in the ground from six inches to two feet, upon which a brick foundation was built, and the bed of the engine was placed upon the brick-work and fastened to the wooden foundation beneath by bolts and screws.

The mill-stones were bolted fast to the floor. Pieces of timber were put in the brick walls and bolted through in the upper part of the building, to which the machinery was attached.

The whole machinery seems to have been securely attached to the building, and to have been solid and substantial, but was secured and fastened usually by bolts and screws, which could be removed without material injury to the building, while some bridges were bolted directly to the walls of the building.

The principal difference in securing the machinery from that ordinarily pursued consisted in using bolts with screws, instead of nails. The machinery was by this means securely fastened to the building and was solid.

The machinery was placed in the buildings with the understanding that the tenant should be at liberty to remove it, and with that end in view, it was substantially attached to the realty, but with bolts and screws, in order that it might be severed with the least possible injury to the realty.

In 1877 plaintiffs herein brought an action against Connolly & Wheat to recover two thousand nine hundred and sixty-six dollars and sixteen cents, and caused a writ of attachment to issue, which was levied upon the right, title, and interest of defendants in and to the lot of land and premises so leased as aforesaid.

The sheriff, also, by direction of plaintiffs, at the same time attached the machinery now in controversy as personal property.

Plaintiffs had judgment, and thereafter caused an execution to issue, under which the sheriff levied upon the real estate or lot having the mill and machinery thereon, and afterward, on the nineteenth day of

October, 1877, sold the same in due form as real estate, plaintiffs becoming the purchasers, and no redemption having been had, said plaintiffs, on the fourth day of May, 1878, received a sheriff's deed in due form of said land and premises.

Defendant Connolly having, prior to the expiration of the lease, removed the machinery, or most of it, this action was brought.

A demand of possession by plaintiffs from defendant is averred to have been made on the thirty-first day of December, 1880.

The answer denies specifically that any demand for delivery of possession was ever at any time made, and the court finds that no demand was in fact ever made. We have examined the record in vain for evidence of a demand.

In an action to recover personal property, or its value, where it appears that the property came lawfully into the possession of the defendant, a demand and refusal to deliver must be shown: Bacon v. Robson, 53 Cal. 399.

If the original possession of property is acquired by tort, no demand previous to the institution of a suit is necessary: Sargent v. Sturm, 23 Cal. 359; Wellman v. English, 38 Id. 583.

Defendant Connolly, as the lessee of the premises or lot of land upon which the mill and machinery were erected, was lawfully in possession. He and his copartner caused the machinery to be placed in the buildings, and owned and possessed it until, by the sale under execution and failure to redeem, the title passed, by sheriff's deed, to the plaintiffs.

If the machinery was not attached to the realty so as to pass by a sale of such realty plaintiffs acquired no right to it, for they sold the interest of defendants as real estate, and not as personal property.

Treating it, then, as real property, the plaintiffs were entitled, upon presentation of their sheriff's deed, to be let into possession. Until they did so the defendant might lawfully remain in the enjoyment of the property.

They never demanded delivery or possession, and defendant being thus lawfully in possession was not guilty of the unlawful detention necessary to support an action until by demand and refusal his detention became wrongful.

It follows from this view of the case that plaintiffs were not in a position at the date of suit brought to maintain an action, and the judgment and order in favor of defendant should be affirmed.

BELCHER, C. C., and FOOTE, C., concurred.

By the COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

NECESSITY OF DEMAND, GENERALLY BEFORE ACTION: See Nelson v. Bostwick, 40 Am. Dec. 310, and note 313; in actions of trover: Magee v. Scott, 55 Id. 49, and note 51. In an action by a principal against an agent, for money had and received, a demand must be averred: 5 West Coast Rep. 621. No demand is necessary, in an action to recover possession of personalty, where the original taking was unlawful, although the defendant came into the possession without any imputation of fraud, or intention of wrong: Surles v. Sweeney, 3 Id. 569; nor is it necessary, in an action by the owner of property, sold under execution against another, if at the time of the levy the property was not in possession of the execution debtor: Stone v. O'Brien, 4 Id. 243.

No. 9,046.

HARMON ET AL. *v.* ASHMEAD ET AL.

In Bank. Filed December 30, 1885.

MECHANIC'S LIEN—FORECLOSURE—PLEADING—BURDEN OF PROOF.—In an action to foreclose a mechanic's lien, a denial in the answer of an allegation in the complaint that the interests or claims of the defendants were subordinate and subject to the lien of the plaintiff does not cast on him the burden of proving that allegation. If the defendants had stated facts showing that their claim was not subordinate or subject to the lien of the plaintiff they would have had the affirmative of the issue. It was their business when thus called upon to disclose the nature of their claims. By not doing so they can occupy no better position than they would if they had done so.

THE SAME—DEFENDANT, WHEN HAS AFFIRMATIVE.—Conceding that such denial raised an issue, it was one of which the defendants had the affirmative, and if they introduce no evidence to support it the court is justified in finding that their claim was subordinate and subject to the plaintiff's.

THE SAME—STATEMENT IN LIEN—COMPLETION OF BUILDING.—It is unnecessary to state in a lien that a building, in the construction of which materials have been furnished and labor performed, has been completed.

APPEAL from a judgment of the superior court of the city and county of San Francisco, entered in favor of the plaintiffs, and from an order denying the defendant a new trial. This was an action to foreclose a mechanic's lien. The complaint alleged that the defendants, other than Ashmead, were mortgagees. The opinion in department is reported in 6 West Coast Rep. 487.

Cowdery & McCutcheon, and *William H. Fifield*, for the appellants.

E. S. Pillsbury, for the respondents.

SHARPSTEIN, J. The denial in the answer of the allegation in the complaint that the interests or claims of the defendants answering were subordinate and subject to the lien of the plaintiff did not cast on him the burden of proving that allegation. If the defendants in their answer to that allegation had stated facts which showed that their claim was not subordinate or subject to the lien of the plaintiff, they would have had the affirmative of the issue. And it was their "business when thus called upon to disclose" the nature of their claim: Anthony v. Nye, 30 Cal. 401. By not doing so they certainly occupy no better position than they would if they had done so.

Conceding that the denial of the defendants raised an issue, we think it was one of which they had the affirmative, and as they introduced no evidence to support it, the court was justified in finding that their lien was subordinate and subject to the plaintiff's.

It is stated in the lien and alleged in the complaint that the defendant Ashmead agreed to pay for the materials furnished by plaintiff, upon the completion of the building. And it is further alleged in the complaint that at the date of the commencement of this action the building had not been completed; and that said defendant did not intend to complete it; and that he had notified plaintiff to that effect. Thereupon the sum which said defendant had agreed to pay for said materials doubtless became due.

It is unnecessary to state in a lien that a building, in the construc-

tion of which materials have been furnished and labor performed, has been completed. But the lien filed in this case did so state. That was doubtless done for the purpose of showing that the sum which the owner had agreed to pay for said materials had become due. The sum had become due but not for that reason. There was a misstatement but not of a material fact. In either event the sum claimed would be due was due. And that was the material fact. Whether due for the reason stated in the lien or for the one stated in the complaint, the rights of the parties would be the same. The law was sufficiently complied with, and nothing more should be required.

We think the name of the owner of the premises is stated in the lien as fully as the law required it to be.

In other respects we think the liens filed were substantially in conformity with the statute.

Judgment and order affirmed.

McKEE, THORNTON, and MYRICK, JJ., concurred.

MECHANICS' LIENS—EXAMPLES OF SUFFICIENCY AND INSUFFICIENCY OF STATEMENTS IN: See Wheeler v. Port Blakeley Mill Co., 2 West Coast Rep. 555; Malter v. Falcon Mining Co., 1 Id. 514; Arata v. Tellurium etc. Mining Co., 3 Id. 151; Merchant v. Humiston, 7 Id. 452; Hobbs v. Spiegelberg, 5 Id. 327.

MECHANIC'S LIEN MUST BE FILED AFTER COMPLETION OF BUILDING: Perry v. Brainard, 8 West Coast Rep. 429.

No. 8,535.

LAFARGUE ET AL. v. HARRISON ET AL.

In Bank. Filed December 30, 1885.

LETTER OF CREDIT DEFINED—GENERAL AND SPECIAL LETTER.—A letter of credit may be defined to be a letter of request whereby one person requests some other person to advance money or give credit to a third person, and promises that he will repay or guarantee the same to the person making the advancement. It is called a general letter of credit when it is addressed to all persons in general, requesting such advance to a third, and a special letter of credit when addressed to a particular person by name.

THE SAME—LIABILITY OF WRITER UNDER GENERAL LETTER.—When addressed to all persons it is in effect a request made to any person to whom it may be presented, and any one may accept and act upon the proposition contained in it, and when he does so that which before was indefinite and at large becomes definite and fixed. A contract immediately springs up between the person making the advancement and the writer of the letter, and it is thenceforward the same thing in legal effect as though the name of the former had been inserted in the letter in the beginning.

THE SAME—LIABILITY OF WRITER UNDER SPECIAL LETTER.—And the same legal effect follows action by the person to whom a special letter of credit is addressed. He has the right to act upon it, and when he accepts the letter placed in his hands by the person for whose benefit it was written, and gives him credit in compliance with it, there springs from the letter and its acceptance a distinct contract, which is auxiliary to the principal contract between the person for whose benefit the letter was written and the person to whom it was addressed, which is binding upon the writer of the letter. And this writer is, upon the default of the debtor, liable to those who gave credit in accordance with its terms.

THE SAME—CASE IN JUDGMENT.—In 1877 John Mel & Sons, being engaged in a general commission business in the city of San Francisco, having a branch house in the city of Bordeaux, France, and doing their banking business with the plaintiffs, obtained from the

defendants, then doing business under the name and style of Falkner, Bell, & Co., a letter of credit, as follows: "San Francisco, Sept. 20, 1877. The Merchants' Banking Company of London (Limited), 112 Cannon street, London—Dear Sirs: At the request of Messrs. John Mel & Sons of this city, we hereby authorize Messrs. A. Lafargue & Co. of Bordeaux to draw on you at sixty days' sight for our account, to the amount of three thousand pounds sterling (£3,000). All drafts must be drawn at Bordeaux, and be accompanied by due advice. This credit to be in force for twelve months from October 31, 1877, to October 31, 1878. We are, dear sir, yours faithfully, Falkner, Bell, & Co." *Held*, that the proposition fairly deducible from the language of such letter was a promise on the part of the defendants to guarantee the credit of Mel & Sons for twelve months, from October 31, 1877, until October 31, 1878, to the amount of three thousand pounds sterling, and for that to authorize Lafargue & Co. at Bordeaux, to draw on the Merchants' Bank of London (Limited) for their account, by sixty days' sight draft or drafts, the same to be drawn at Bordeaux; that upon the acceptance of such proposition by Lafargue & Co. a contract was created between them and the writers; and that, upon the dishonor of drafts drawn by them on the Merchants' Bank of London, in conformity with such letter of credit, the defendants were liable.

APPEAL from a judgment of the superior court of the city and county of San Francisco, entered in favor of the plaintiffs, and from an order denying the defendants a new trial. The opinion states the facts.

Wilson & Wilson, for the appellants.

McAllister & Bergin, for the respondents.

FOOTE, C. From the record in this action it appears that in the year 1877 John Mel & Sons, being engaged in a general commission business in the city of San Francisco, having a branch house in the city of Bordeaux, France, and doing their banking business with Lafargue & Co., the plaintiffs in this action, obtained from the defendants, then doing business under the name and style of Falkner, Bell, & Co., a letter of credit, as follows:

"SAN FRANCISCO, Sept. 20, 1877.

"THE MERCHANTS' BANKING COMPANY OF LONDON (LIMITED), 112 CANNON STREET, LONDON—*Dear Sirs:* At the request of Messrs. John Mel & Sons of this city, we hereby authorize Messrs. Lafargue & Co. of Bordeaux to draw on you at sixty days' sight for our account, to the amount of three thousand pounds sterling (£3,000).

"All drafts must be drawn at Bordeaux, and be accompanied by due advice. This credit to be in force for twelve months from thirty-first October, 1877, to thirty-first October, 1878.

"We are, dear sirs, yours faithfully, FALKNER, BELL, & Co."

Of the issuance thereof Lafargue & Co. and the bank above mentioned were duly advised. Mel & Sons deposited the letter in the bank of Lafargue & Co., as a guaranty or security for advances that might be made by that bank to them, and upon the faith and credit of such guaranty, and of another on the part of some ladies, the relatives of the Mels, which was also at the same time so deposited, Lafargue & Co., between the times mentioned in the letter of credit as the period during which it was to remain in full force and effect, made advances to Mel & Sons the sum of ninety-nine thousand six hundred and forty-five francs and sixty centimes, equivalent to the sum of nineteen thousand two hundred and thirty-one dollars and fifty-three cents of the money of the United States of America, of which sum the other

guarantors above mentioned paid plaintiffs thirty thousand francs, leaving unpaid sixty-nine thousand six hundred and forty-five francs and sixty centimes, equivalent to the sum of thirteen thousand four hundred and forty-one dollars and fifty-four cents in money of the United States.

On the tenth day of October, 1878, on the faith of the said letter of credit, and for liabilities contemplated by the parties at the time of the issuance thereof, the plaintiffs drew a bill of exchange, which, translated into the English language, reads as follows:

"BORDEAUX, Oct. 10, 1878.
B. P. £3,000.

"At sixty days' sight pay on the single of exchange to our order the sum of three thousand pounds sterling, value received by us, which charge according to the letter of credit of Messrs. Falkner, Bell, & Co., dated San Francisco, September 20, 1877.

(Signed) "A. LAFARGUE & Co.

"The Merchants' Banking Co. of London (limited), 112 Cannon Street, London."

This draft the pleadings admit to have been accompanied by a letter of advice and notice. It was presented on the fourteenth of October, 1878, to the London Bank for acceptance, which was refused. On the sixteenth of December, 1878, it was presented to that bank for payment, which was also refused. Thereupon it was protested for both non-acceptance and non-payment. Lafargue & Co. brought this action to recover from the defendants the amount of that draft, basing their demand upon the obligations imposed upon Falkner, Bell, & Co. by virtue of the terms of the letter of credit.

Judgment for the amount claimed was rendered in favor of the plaintiffs, the defendants entered their motion for a new trial, and it was denied. From the order made in the premises and the judgment the defendants appealed.

Letters of credit are general or special, and whether one partakes of the characteristics of the former or the latter class depends upon the reasonable construction to be placed upon the language specially employed therein.

Daniel on Negotiable Instruments, at page 666, vol. 2, says: "A letter of credit may be defined to be a letter of request, whereby one person requests some other person to advance money or give credit to a third person, and promises that he will repay or guarantee the same to the person making the advancement. It is called a general letter of credit when it is addressed to all persons in general, requesting such advance to a third, and a special letter of credit when addressed to a particular person by name.

"When addressed to all persons it is, in effect, a request made to any person to whom it may be presented, and any one may accept and act upon the proposition contained in it, and when he does so, that which before was indefinite and at large becomes definite and fixed. A con-

tract immediately springs up between the person making the advancement and the writer of the letter, and it is thenceforward the same thing in legal effect as though the name of the former had been inserted in the letter in the beginning:" Birchhead v. Brown, 5 Hill, 643.

And the same legal effect follows action by the person to whom a special letter of credit is addressed. He has the right to act upon it, and when he accepts the letter placed in his hands by the person for whose benefit it was written, and gives him credit in compliance with it, there springs from the letter and its acceptance a distinct contract, which is auxiliary to the principal contract, between the person for whose benefit the letter was written and the person to whom it was addressed which is binding upon the writer of the letter. And this writer is, upon the default of the debtor, liable to those who gave credit in accordance with its terms: Civ. Code, sec. 2860.

It is contended by counsel for the defendants that the one in hand is a special letter of credit, and that no privity exists between the writers thereof and the plaintiffs.

The question, then, to be determined is, whether or not the proposal or proposition contained in that letter was intended to be made; or, what is the same thing in legal effect, could from its verbiage reasonably be construed to be intended to be made to Lafargue & Co.

"To construe the words of such instrument with wise and technical care would not only defeat the intentions of the parties, but render them too unsafe a basis to rely on for extensive credits, so often sought in the present active business of commerce throughout the world:" Lawrence v. McCalmont, 2 How. 426.

We must look, then, at the letter itself, and give to its terms and the language employed a reasonable interpretation according to the intent of the parties, as disclosed by the instrument, read in the light of surrounding circumstances and the purposes for which it was made. If there is anything ambiguous in it, it should be taken most strongly against the parties who have induced Lafargue & Co. to act upon and give credit to their supposed intent: Belloni v. Freeborn, 63 N. Y. 383.

What was the proposition fairly deducible from the language of that letter? It is this:

We guarantee the credit of Mel & Sons for twelve months, from October 31, 1877, until October 31, 1878, to the amount of three thousand pounds sterling, and for that amount we authorize Lafargue & Co., at Bordeaux, to draw on the Merchants' Bank of London (Limited) for our account by sixty days' sight draft or drafts, the same to be drawn at Bordeaux.

In other words, Falkner, Bell, & Co. said to Lafargue & Co., Give Mel & Sons credit in your bank to the extent of three thousand pounds, and draw for it draft or drafts at Bordeaux upon the Merchants' Bank of London (Limited), and we will guarantee their acceptance and payment at that bank, provided they are drawn at sixty days' sight, are

accompanied with due advice and notice to that bank, a
between the thirty-first of October, 1877, and the same

This proposition thus made and accepted by Lafargue
think, sufficient to create a contract between the writers
& Co.

If A says to B, Advance so much money to C and I w
it is an original promise, and if the money is paid upon t
it has been always held an obligatory promise: Townsley
Pet. 182.

Where the evidence showed the credit to have been gi
faith of a letter by the person for whom the letter was in
Justice Marshall said:

"The writing was certainly intended by the defendan
credit to another. The defendants are bound by every
moral rectitude and good faith to fulfill the expectations
thus raised, and which induced the plaintiffs to part with
erty:" Lawrason v. Mason, 3 Cranch, 492.

If one of two must suffer, it should be the one from w
injury results.

If Lafargue & Co., acting in good faith, had a right r
infer from the language of Falkner, Bell, & Co.'s letter tha
authorized to give credit to Mel & Sons, as they did, a
drafts specified in that instrument would be paid by the L
then common justice requires the defendants should mak
guaranty, and since, by their act in revoking the letter o
bank failed to pay the plaintiffs' draft, they should assume
the bank and pay it.

There is no case which we have had cited to us, or wh
been enabled to find, which in all respects is similar to th
consideration. But that which most closely resembles it is
Morrison, 2 Met. 381.

There a Boston merchant was indebted to some merchan
burg, Sweden, and procured from the agent in Boston of
house in London a letter of credit, as follows:

"BOSTON, Marc

"MESSRS. MORRISON, CRYDER, & Co., LONDON: Mr. Jo
of this city, having requested that a credit may be open
for his account in favor of Messrs. D. Carnegie & Co. of
for three thousand pounds sterling, I have assured him th
will be accorded by you on the usual terms and condition
fully, your obedient servant, FRANCIS J.

The London bankers were advised of the issuance of th
that it would be forwarded to Carnegie & Co., and it wa
to them by the party in whose favor it was written, and
them "to value for the amount of three thousand poun
days' sight, and pass the same to his credit."

Relying upon this letter of credit, Carnegie & Co., and i
with its terms, drew a bill on the London bankers, which w

for acceptance and payment, and both refused. Carnegie & Co. then instituted an action to recover the amount of that draft, basing their right of recovery on the letter of credit.

The defendants alleged that they were under no obligation to pay Carnegie & Co.; that no contract existed between them.

Chief Justice Shaw said upon that point, among other things: "The objection to such an action and the grounds of this defense are, that the immediate parties to the transaction were Bradford (the person in whose favor the letter was written) on the one side, and the defendants on the other; that to this transaction the plaintiffs were strangers, and that as Bradford acquired some right under it, and had a remedy upon it against the defendants, their contract must be deemed to be made with him, and not with the plaintiffs.

"But this position presupposes that the same instrument may not constitute a contract between the original parties, and also between one or both of them and others, who may subsequently assent to and become interested in its execution; an assumption quite too broad and unlimited, which the law does not warrant. In a common bill of exchange the drawer contracts with the payee that the drawee will accept the bill; with the drawee, that if he does accept and pay the bill he, the drawer, will allow the amount in account, if he has funds in the drawee's hands; otherwise, that he will reimburse him the amount thus paid. He also contracts with any person who may become indorsee that he will pay him the amount if the drawee does not accept and pay the bill. The law creates the privity. So in the familiar case of money had and received, if A deposits money with B to the use of C, the latter may have an action against B, though they are in fact strangers. But if C, not choosing to look to B as his debtor, calls upon A to pay him, notwithstanding such deposit (as he may), and A pays him, A shall have an action against B to recover back the money deposited, if not repaid on notice and demand. The law, operating upon the act of the parties, creates the duty, establishes the privity, and implies the promise and obligation on which the action is founded: Hall v. Marston, 17 Mass. 575."

On page 403, 2 Metcalf, the learned judge continues as follows: "The court are of opinion that the promise of the defendants made by the letter of credit in the present case comes within the principle of the cases cited. Bradford was indebted to the plaintiffs, and was desirous of paying them; and he must resort to some mode of remittance. He had funds, either in cash or credit, with the defendants, and entered into a contract with them to pay a sum of money for him to the plaintiffs. And upon the faith of that undertaking he forebore to adopt other measures to pay the plaintiffs' debt. He gave the plaintiffs notice of what he had done, and sent them the instrument as authentic evidence of the fact. They assented to and affirmed it, as an act done in their behalf, and gave the defendants notice thereof, and conformably to the terms of the letter of credit drew their bills on the defendants. The refusal to accept was a breach of the promise thus made, and in

the event that happened (the insolvency of Bradford) the plaintiffs lost their debt. It would be in vain to say that this promise was not made for the benefit, or (according to the terms of some of the cases) for the interest of the plaintiffs. The result shows that by a compliance with the plain, literal terms of their promise on the part of the defendants, the plaintiffs would have received their debt. By a refusal to perform that promise they have lost it. They are therefore damnified to the full amount of the sum for which the credit was given."

To much the same effect is the reasoning of the courts in Russell v. Wiggin, 2 Story, 213; Lonsdale v. The Lafayette Bank of Cincinnati, 18 Ohio, 126; Barney v. Newcomb, 9 Cush. 59; Scott v. Pilkington, 15 Abb. Pr. 281.

We have examined with great care, and much admiration for their research, perspicuity of expression, and strength of argument, the various briefs of the distinguished counsel in this cause.

We rise from their study profoundly impressed with the belief that the plaintiffs, from the terms of the letter of credit under consideration, had a legal right to expect that the drafts drawn by them on the London bank would be paid by that bank, or that this failing, the defendants must make good to them the loss thus incurred, as they had promised.

"By a refusal to perform that promise" on the part of the defendants, the plaintiffs lost their debt.

"They are therefore damnified to the full amount of the sum for which the credit was given."

We perceive no prejudicial error in the record, and the judgment and order should be affirmed.

SEARLS, C., and BELCHER, C. C., concurred.

By the COURT. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

LETTER OF CREDIT, LIMIT OF: See Union Bank of Louisiana v. Coster, 53 Am. Dec. 280, and note 289. As to continuing guaranties in general, and examples of, see Scott v. Myatt, 60 Id. 485; Lowe v. Beckwith, 58 Id. 659; Menard v. Scudder, 56 Id. 610, and note 619; Fellows v. Prentiss, 45 Id. 484, and note 492; Rapelye v. Bailey, 13 Id. 49.

No. 8,209.

MARTIN ET AL *v.* WALKER ET AL.

Department Two Filed December 30, 1885.

PARTITION—CONVEYANCE PENDENTE LITE—STATUTE OF LIMITATIONS.—An action for partition of certain lands, including the land in controversy, was commenced against the defendant and others in 1860, and was determined in 1877. Pending such action the defendant W. conveyed to the plaintiffs an undivided part of the land claimed by him. The plaintiffs did not become parties to the partition proceedings. In 1878 the plaintiffs demanded of the defendant W. to be let into possession of the land allotted to him in the partition suit. This the defendant refused. *Held*, that the statute of limitations did not commence to run against the plaintiffs until such demand and refusal.

APPEAL from a judgment of the superior court of Marin county, entered in favor of the defendants, and from an order denying the plaintiffs a new trial. The opinion states the facts.

E. S. Lippitt and *C. V. Grey*, for the appellants.

A. W. Thompson, for the respondents.

MORRISON, C. J. Ejectment for lands embraced within the rancho Laguna de San Antonio, in Marin county, California. The lands in controversy are a portion of the tract of land included in the partition suit of Gates v. Salmon, commenced in the year 1860 and finally determined in the fourth district court March 28, 1877. In the partition suit referred to, the lands described in the complaint in this action were set apart and allotted to Walker, the defendant in this action, who was also a party defendant in the suit for partition of the rancho.

The plaintiffs here claim title as tenants in common with Walker under certain deeds executed by him to them and their grantors, and the defendant Walker, he being in fact the only defendant in the case, claims to own the lands in severalty, by virtue of a long adverse and exclusive occupancy and possession of the same. Defendant's plea of the statute of limitations was sustained by the court below, and this is the only question presented for consideration on appeal.

On the trial the defendant testified as follows: "I know the land described in my answer in the case of Gates v. Salmon, ... and also that described in the complaint in this action. The land described in this complaint is the same thing as that described in that answer. I have occupied that land for over twenty years. No one has occupied it with me. Neither of the plaintiffs have ever had possession of any of that land. The land is fenced both by an exterior and a cross fence. I have used the whole of the land for farming and grazing. The description in the answer includes the old Potrero, which I occupied for a number of years, and sold off to Davis and another, and it also includes the first five described tracts in the complaint. I ain't going to be too sure about that, I want you to understand; but I think that at the time that description in the answer was made that I owned that Potrero. I would not be too positive about it, however. I owned special locations 14 and 12 when the partition suit was commenced, and at the time I became a member of the league the tract described as No. 1 in the complaint was within the boundaries of special location No. 14, and the tract described as No. 2 in the complaint was within the boundaries of special location No. 12."

And the following were the findings of the court:

"2. In the year 1865 plaintiffs and defendant Walker were tenants in common in a certain large tract of land called the rancho Laguna de San Antonio, each having an undivided interest therein. Of this rancho, the land described in the complaint is a parcel.

"3. The defendant Walker, in 1865, ousted plaintiff from said parcel, took exclusive possession thereof adversely to plaintiffs and all other persons, claimed to own the same in severalty, and has ever

since then continuously remained and now is in the exclusive possession thereof, adversely to plaintiffs and all other persons, and has ever since then claimed and now claims to be the owner thereof in severalty.

"4. Of the facts that Walker had so ousted them from said parcel, that he claimed to own the same in severalty, that he had taken the exclusive possession thereof adversely to plaintiffs and all other persons, the plaintiffs herein were notified in the year 1865, and they have ever since then been aware that he was in the exclusive possession thereof, adversely to plaintiffs and all other persons, and claimed to be the owner thereof in severalty.

"From the foregoing facts, as conclusions of law, the court finds that plaintiffs ought not to take anything by this action, but that defendants should have judgment herein against plaintiffs for their costs of suit, and judgment is so ordered."

It was also shown that the plaintiff Martin, on the twenty-fifth day of May, 1878, made a demand of Walker to be let into the possession of the land in controversy in the following language:

"PETALUMA, May 25, 1878.

"To L. W. WALKER, ESQ.: I hereby demand to be let into possession of the property hereinafter described, by virtue of a deed made and executed by you to me, dated August 24, 1864, and conveying one forty-first part of the rancho Laguna de San Antonio, and also a deed made and executed by you to William Robson, dated August 24, 1864, conveying one-eightieth part of said rancho, said Robson having conveyed the same to me by deed, dated August 26, 1864. I make this demand as tenant in common with you in said land now in your possession, and to the extent of my said interest in said rancho, the same having been set apart to you by a decree made and entered in the district court of the fourth judicial district of California in the case of Gates v. Salmon and others, in connection with your interests in said rancho. Said lands comprising our joint tenancy are described as follows:

"The tracts, lots, and parcels of land known and designated upon the partition map, and in the decree of partition of said rancho, made and entered in the fourth district court, as tracts Nos. 1, 2, 3, 4, 5, 6, and 7 of L. W. Walker's subdivision of said rancho, containing one thousand six hundred and forty-six acres. C. MARTIN."

The demand was refused by the defendant Walker.

The plaintiff offered in evidence on the trial a deed from Walker, the defendant, to William Robson, dated August 24, 1864, for a part of the land sued for. A deed from Walker to Charles Martin and Giuliano Moretti, bearing date August 24, 1864, for a portion of the premises; also a deed from Robson and Moretti to Charles Martin dated August 24, 1864, and a deed from Martin to Moretti. These last-named deeds were for a portion of the lands sued for.

As already remarked, the only question before us is the correctness of the judgment sustaining the defendant's plea of the statute of limitations.

We are of the opinion that the evidence was not sufficient to establish the plea of the statute of limitations. The partition case of Gates v. Salmon was commenced in 1860, and did not end until the year 1877. The defendant Walker was a party to that proceeding, and while it was pending deeded an undivided part of the land claimed by him to the plaintiffs. The plaintiffs did not become parties to the proceeding in partition.

We think the statute of limitations did not commence to run until the demand was made by Martin in 1878 to be let into possession as a co-tenant with the defendant. The action was brought in 1879, so that five years had not run from such refusal and ouster before the action was brought. We, therefore, think the statute had not run, and the judgment and order below should be reversed. It is so ordered.

MYRICK and SHARPSTEIN, JJ., concurred.

IN RE SMITH *v.* LING.

Department One. Filed December 31, 1885.

SUMMARY PROCEEDING TO REMOVE OFFICER.—The summary proceedings provided by section 772 of the penal code are aimed at certain public officers as such, with the object of removing them from office, and when they cease to hold office they are no longer amenable to such proceeding.

THE SAME—DEFECTIVE INFORMATION.—An information under such section is defective if it cannot be determined therefrom, with certainty, whether the defendant is sought to be charged with "charging and collecting illegal fees for services rendered" or with refusal or neglect to perform the official duties pertaining to his office; or when, treated as an information for charging illegal fees, it fails, except by way of recital, to show that such fees were illegal or were collected; or when there is no charge that the defendant knowingly, willfully, or corruptedly charged and collected illegal fees or neglected to perform any official duty.

APPEAL from a judgment of the superior court of Los Angeles county, entered in favor of the defendant. The opinion states the facts.

U. Smith, for relator and appellant.

R. A. Ling, for the respondent.

SEARLS, C. The defendant, R. A. Ling, was a justice of the peace in and for Los Angeles township, county of Los Angeles, from January, 1883, to January 5, 1885.

This is a proceeding under section 772, of the penal code, which relates to the offense of "charging and collecting illegal fees" by officers, and for the refusal or neglect to "perform the official duties pertaining to his office."

The information, which was filed after the defendant ceased to be an office-holder, is quite lengthy and contains so many statements of fact by way of recital only, and so much that is indefinite and uncertain that we shall not attempt a synopsis of the facts.

Defendant moved the court to set aside the information upon several

grounds. The motion was granted and judgment rendered in favor of defendant.

The accusation or information was defective in these respects:

1. It cannot be determined therefrom, with any certainty, whether defendant is sought to be charged with "charging and collecting illegal fees for services rendered" or with refusal or neglect to perform the official duties pertaining to his office as a justice of the peace.

2. Treated as an information for charging illegal fees, it fails except by way of recital to show that such fees were either illegal, or that they were collected.

3. There is no charge that defendant knowingly, willfully, or corruptly charged and collected illegal fees, or neglected to perform any official duty: Triplett v. Munter, 50 Cal. 644.

4. Defendant's term of office having expired January 5, 1885, and the accusation not having been filed until May, 1885, defendant was not an officer at the date of the institution of the proceedings.

The summary proceedings provided by section 772 of the penal code are aimed at officers as such, and result, where the defendant is found guilty, in his being deprived of his office.

The statute also provides that a judgment of five hundred dollars shall be entered in favor of the informer.

This last provision was no doubt inserted as an inducement for persons having knowledge of official guilt to institute proper complaint, and the fine is but a sequence of the paramount object of the statute, viz., the removal from office of incumbents who knowingly, willfully, and corruptly use their official position as a medium for extortion and wrong.

There are other modes provided in the criminal laws for the punishment of crimes and misdemeanors, whether committed by public or private citizens.

This particular statute seems to be aimed at certain public officers as such, with the definite and fixed object of removing them from office, and when they cease to hold office, they are no longer the subjects of a prosecution having for its main object the depriving them of that which they, as ex-officers, do not possess.

There are other objections to the accusation, but we deem those already referred to conclusive of the case.

The judgment of the court below should be affirmed.

FOOTE, C., and BELCHER, C. C., concurred.

By the COURT. For the reasons given in the foregoing opinion the judgment is affirmed.

appellant will pay the amount directed to be paid by such judgment or the part of such amount as to which said judgment is affirmed, if affirmed only in part, and all costs which may be awarded against the appellant upon said appeal.

"And that if the appellant does not make such payment within thirty (30) days after the filing of the *remittitur* from the supreme court in the court from which said appeal is taken, judgment may be entered in said action on motion of the respondent, in her favor, against the undersigned sureties for such amount, together with the interest that may be due thereon, and the damages and costs which may be awarded against the appellant on said appeal.

"And whereas the said defendant is about to appeal to the said supreme court of the state of California, from the order or judgment made and entered by said superior court in said action on February 16, A. D. 1885, against the defendant, requiring him to pay to plaintiff, or her order, on or before March 9, A. D. 1885, the sum of seven thousand five hundred dollars ($7,500) as alimony, and the further sum of two thousand five hundred dollars ($2,500) on or before April 8, A. D. 1885, and two thousand five hundred dollars ($2,500) on or before the eighth day of each and every month thereafter as alimony in said action, and further requiring the defendant to pay as counsel fees in said action, on or before March 9, A. D. 1885, the sum of fifty-five thousand dollars ($55,000), apportioned among and payable to the several counsel of plaintiff as in said order or judgment is designated, and further directing execution to issue pursuant to section 1007 of the code of civil procedure of the state of California, in default of the payment of said sums or any of them, as in said order specified.

"Now, therefore, in consideration of the premises, and of said appeal from said order or judgment, we, the undersigned, Lloyd Tevis of the city and county of San Francisco, state of California, and E. J. Baldwin of the same place, do hereby jointly and severally undertake and promise, on the part of the appellant, that the said appellant will pay all damages and costs which may be awarded against him on the said appeal, or on a dismissal thereof, not exceeding three hundred dollars ($300), for which amount we acknowledge ourselves jointly and severally bound.

"And whereas the appellant is desirous of staying the execution of the said order or judgment directing the payment by him of alimony and counsel fees as aforesaid, and every part thereof, we, the undersigned sureties, do further, in consideration thereof, and of the premises, jointly and severally undertake and promise, and do acknowledge ourselves further jointly and severally bound in the sum of three hundred and five thousand dollars ($305,000), being double the amount named in said order or judgment, and directed to be paid on or before March 9, A. D. 1885, and also double the amount of all alimony awarded to the plaintiff, and directed to be paid to her for the full period of three years from the said ninth day of March, A. D. 1885, and that if the said order or judgment for alimony and counsel fees appealed from, or

sum of fifty-five thousand dollars counsel fees and the sum of twenty-five hundred dollars per month to the plaintiff as alimony from the eighth day of January, 1885, and directing execution to be issued therefor pursuant to section 1007 of the code of civil procedure of the state of California, unless the sum of sixty-two thousand five hundred dollars ($62,500) be paid on or before the ninth day of March, 1885, and from every part thereof.

"And that on the appeal from the judgment herein declaring a marriage to exist between the said plaintiff and said defendant and awarding other relief, the said supreme court will be asked to review and set aside the order for the payment of money above referred to, made and entered herein on the sixteenth day of February, A. D. 1885, and every part thereof."

The second paragraph of this notice refers to the rule directing the payment of alimony and counsel fees above mentioned. This notice of appeal is amply sufficient and is in compliance with section 940 of the code of civil procedure. It is no less sufficient because notice of appeal from a judgment between the same parties and in the same case is embraced in the same paper, nor because the defendant as a measure of precaution has inserted in the notice the last paragraph, referring to the order directing the payment above mentioned. This paragraph is surplusage, which does no injury. *Utile, per inutile non vitiatur:* Broom's Legal Maxims, 603.

The undertaking on appeal from the order above mentioned is also in the record which comes to this court. The following is a copy of it:

"Whereas, William Sharon, the defendant in the above-entitled action, is about to appeal to the supreme court of the state of California from the judgment made and entered against him in said action in the said superior court on February 19, A. D. 1885, in favor of Sarah Althea Sharon, plaintiff in said action, declaring a marriage to exist between said plaintiff and defendant, and awarding her other relief and for costs of the action.

"Now, therefore, in consideration of the premises, and of said appeal from said judgment, we, the undersigned, Lloyd Tevis of the city and county of San Francisco, state of California, and E. J. Baldwin of the same place, do hereby jointly and severally undertake and promise on the part of the appellant that the said appellant will pay all damages and costs which may be awarded against him on the said appeal, or on a dismissal thereof, not exceeding three hundred dollars ($300), for which amount we acknowledge ourselves jointly and severally bound

"And whereas the applicant is desirous of staying the execution of said judgment for costs, we, the undersigned sureties, do further, in consideration thereof, and of the premises, jointly and severally undertake and promise and do acknowledge ourselves further jointly and severally bound in the further sum of three thousand dollars ($3,000), being more than double the amount of money or costs awarded to said plaintiff by said judgment, and that if the said judgment appealed from, or any part thereof, be affirmed, or the appeal be dismissed, the

Green and Jackson were parties, and a contest arose between Webb on the one hand and Green and Jackson on the other. This contest was tried by the court without a jury, and resulted in a special decision and judgment in favor of Webb against the other parties just named (Green and Jackson). The court stating the case says:

"The special finding of facts and conclusions of law were made August 28, 1878, and filed October 11, 1878, and judgment thereon was given November 5th, and entered November 9, 1878. A general finding of facts and conclusions of law in favor of the sixty odd persons who had filed answers claiming specific portions of the lands under the act of the legislature, were also made and filed September 17, 1878, and a general judgment containing separate judgments in favor of each of them was filed September 17, 1878, and entered November 8, 1878.

"On November 17, 1879, Green and Jackson appealed from portions of the general judgment entered November 8, 1878, and from portions of the special judgment entered November 9, 1878; and also from the order made and entered on October 3, 1879, denying a motion which they had made to set aside an order which had been made and entered on the fifth of November, 1878, for the issuance of an execution upon the special judgment, under which Webb had been put in possession of the land described in the judgment. These appeals were taken by one notice and on one undertaking; and on December 27, 1879, they also appealed from an order made and entered October 31, 1879, denying a motion for a new trial in the contest, and also from an order made and entered November 15, 1879, striking from the files a notice of intention to move for a new trial which had been filed after the motion for a new trial had been decided, and these last appeals were taken by one notice and one undertaking, so that four appeals have been taken by two notices of appeal and on two undertakings on appeal."

As to this the court said: "An appeal cannot be taken from parts of two judgments and from a special order made after final judgment by one notice of appeal and on one undertaking on appeal."

The report of the case does not set forth either the notice of or undertaking on appeal. But these papers are found in the record in this court.

The undertaking on appeal in the first set of appeals mentioned above, after reciting the taking by the appellant of the three several appeals, concludes with the promises of the undertakers as follows:

"Now, therefore, in consideration of the premises and of such appeal, we, the undersigned, do hereby jointly and severally undertake and promise, on the part of the said appellants, that the said appellants will pay all damages and costs which may be awarded against them or either of them on said appeal, or on a dismissal thereof, not exceeding three hundred dollars, to which amount we acknowledge ourselves jointly and severally bound."

(Then follow date and signatures.)

any part thereof, be affirmed, or the appeal be dismissed, the appellant will pay to the plaintiff, and to the persons named in said order or judgment, and each of them, the several amounts directed to be paid by said order or judgment, or the part of such several amounts as to which the same shall be affirmed, if affirmed only in part, and all damages and costs which may be awarded against the appellant upon the appeal.

"And that if the appellant does not make such payment within thirty (30) days after the filing of the *remittitur* from the supreme court in the court from which the appeal is taken, judgment may be entered in said action on motion of the respondent or the person or persons entitled to said judgment in her, his, or their favor against the undersigned sureties for the whole amount which may then be due, pursuant to the terms of said order, together with the interest that may be due thereon and the damages and costs which may be awarded against the appellant upon the appeal.

"Witness our hands and seals this twenty-sixth day of February, 1885 "LLOYD TEVIS. [Seal]

"E. J. BALDWIN. [Seal]"

It is manifest that this paper contains four undertakings, two of them are those usually styled undertakings on appeal, and the remaining two are the undertakings given to stay execution. All these undertakings are executed by the sureties for the appellant. We see no reason why any number of undertakings should not be contained in the same instrument. In the document under consideration the undertakings and the objects for which they are executed can be clearly distinguished. It is the common practice in this state, and has been from an early period in our jurisprudence, to embrace several undertakings in one instrument. This is well known to both bench and bar. Judge Hayne, who seems to have examined this whole subject with great care, remarks in his book on new trial and appeal, that "there can be no doubt but that several undertakings can be in the same instrument:" Hayne's New Trial and Appeal, sec. 211, p. 645.

Where there are several appeals in the same transcript there should no doubt be an undertaking on appeal for each one of the appeals, and each appeal should be recited in the undertaking: So held in Horn v. Volcano Water Co., 18 Cal. 142; and Bornheimer v. Baldwin, 38 Id. 671. The only exception to the rule that on each appeal there should be a three-hundred-dollar undertaking is where there is in the same notice and transcript an appeal from a judgment with an appeal from an order denying a new trial. In such case, one undertaking on appeal was held sufficient, in Chester v. Bakersfield Town Hall Association, 64 Id. 42. This was so held in consequence of the long and well-settled practice, which this court very properly declined to disturb.

It is contended that the foregoing is inconsistent with what is held in People v. Center, 61 Cal. 191. We cannot concur in this contention. In this case, which was an action to annul a patent, C. C. Webb and

Green and Jackson were parties, and a contest arose between Webb on the one hand and Green and Jackson on the other. This contest was tried by the court without a jury, and resulted in a special decision and judgment in favor of Webb against the other parties just named (Green and Jackson). The court stating the case says:

"The special finding of facts and conclusions of law were made August 28, 1878, and filed October 11, 1878, and judgment thereon was given November 5th, and entered November 9, 1878. A general finding of facts and conclusions of law in favor of the sixty odd persons who had filed answers claiming specific portions of the lands under the act of the legislature, were also made and filed September 17, 1878, and a general judgment containing separate judgments in favor of each of them was filed September 17, 1878, and entered November 8, 1878.

"On November 17, 1879, Green and Jackson appealed from portions of the general judgment entered November 8, 1878, and from portions of the special judgment entered November 9, 1878; and also from the order made and entered on October 3, 1879, denying a motion which they had made to set aside an order which had been made and entered on the fifth of November, 1878, for the issuance of an execution upon the special judgment, under which Webb had been put in possession of the land described in the judgment. These appeals were taken by one notice and on one undertaking; and on December 27, 1879, they also appealed from an order made and entered October 31, 1879, denying a motion for a new trial in the contest, and also from an order made and entered November 15, 1879, striking from the files a notice of intention to move for a new trial which had been filed after the motion for a new trial had been decided, and these last appeals were taken by one notice and one undertaking, so that four appeals have been taken by two notices of appeal and on two undertakings on appeal."

As to this the court said: "An appeal cannot be taken from parts of two judgments and from a special order made after final judgment by one notice of appeal and on one undertaking on appeal."

The report of the case does not set forth either the notice of or undertaking on appeal. But these papers are found in the record in this court.

The undertaking on appeal in the first set of appeals mentioned above, after reciting the taking by the appellant of the three several appeals, concludes with the promises of the undertakers as follows:

"Now, therefore, in consideration of the premises and of such appeal, we, the undersigned, do hereby jointly and severally undertake and promise, on the part of the said appellants, that the said appellants will pay all damages and costs which may be awarded against them or either of them on said appeal, or on a dismissal thereof, not exceeding three hundred dollars, to which amount we acknowledge ourselves jointly and severally bound."

(Then follow date and signatures.)

The undertaking on appeal in the second set of appeals above mentioned, after reciting the taking by appellants of such appeals, the promise of the undertakers is stated in these words:

"Now, therefore, in consideration of the premises and of such appeal, we, the undersigned, do hereby jointly and severally undertake and promise, on the part of the appellants, that the said appellants will pay all damages and costs which may be awarded against them on the appeals, or on a dismissal thereof, not exceeding three hundred dollars, to which amount we acknowledge ourselves jointly and severally bound," the date, and signatures of the undertakers then following.

It will be observed that in the promissory part of the first undertaking mentioned, reference is made to only one appeal. "Such appeal" and "said appeal" are the expressions used to signify the intent of the signers. Three hundred dollars, the amount of one undertaking, is the only amount mentioned in the papers. The signatories make themselves responsible for this sum only, and no more.

This is certainly but one undertaking on three appeals, which is not admissible, as shown above in this opinion, except in the single case of an appeal from a judgment and an order denying a motion for a new trial. This was allowed by the court because of the long-continued and well-established practice of giving but one undertaking in such a case.

The second undertaking above mentioned differs a little from the first. The forms of expression used are "such appeal" and "on the appeals," thus leaving it doubtful whether the signers of the undertaking refer to one or two appeals. But the amount for which the parties bind themselves is only the amount of one undertaking, viz., three hundred dollars, and no more. This, then, is but one undertaking on two appeals, and is insufficient for the reasons given as to the undertaking first noticed.

The above sufficiently shows the correctness of the action of the court in dismissing the appeals in People v. Center, and is in accordance with the sentence above quoted from the opinion.

As to the notice of the appeals, if such notice is in one and the same paper in which the several appeals are distinctly designated, we cannot see that such notice is insufficient. Nor do we think that the majority of the court intended so to hold in People v. Center, inasmuch as such holding would be in conflict with the settled practice and the ruling of this court in all cases in which it has been called on to express any opinion.

Some expressions are used in the opinion of the court which appear ambiguous, but there is nothing which indicates that a notice of more than one appeal may not be in one and the same paper, where the matters appealed from are so designated that it can be seen from what the appeal is taken.

The statute as to notice of appeal in this state has been substantially the same ever since the enactment of the practice act of 1851. In Lower v. Knox, 10 Cal. 480, two appeals were taken by one paper.

viz., one from the judgment and the other from an order denying a motion for a new trial. The latter appeal was dismissed because taken too late. The court passed on the appeal from the judgment and affirmed it.

In Horn v. Volcano W. Co., 18 Cal. 143, there were appeals from two or more orders. The court says in the opinion: "The notice of appeal recites that the plaintiff will appeal from all these orders." We infer from the form of expression, "the notice of appeal," adopted by the court, that these appeals were noticed in one paper. The appeals were dismissed, but not on the ground that they were noticed in the same paper.

In Carpentier v. Williamson, 20 Cal. 168, the court said: "An appeal from the judgment may be taken without waiting for the determination of the motion for a new trial, or the two appeals may be, and usually are, prosecuted together."

In the Estate of Pacheco, 29 Cal. 224, the court held a notice of appeal from an order of the probate court made September 3, 1864, denying the petition of Penniman and others for the removal of Emeric and refusing to appoint Penniman, and from all orders and decisions made by the court in that behalf on that day, sufficient. It appears that there were two orders appealed from.

In Peck v. Vandenberg, 30 Cal. 21, there were appeals from the interlocutory judgment and the final judgment, and from an order denying a new trial in an action for partition. The court held the former not appealable (this was before the statute allowing it), but dismissed the appeal from the order denying the new trial because not taken in time, and considered the appeal from the final judgment, and passed on the point raised on it.

The court says: "The appeal is from both judgments, and from the order overruling Vandenberg's motion for a new trial."

In Hihn v. Peck, 30 Cal. 287, there was an appeal from the judgment and the order denying a new trial. The latter was dismissed because not taken in time, the former was considered.

In Peck v. Courtis, 31 Cal. 208, there were four appeals. All were dismissed. The first was dismissed because from an order which was non-appealable. The second because not taken in time. The third because not appealable. The fourth as not taken in time.

In Genella v. Relyea, 32 Cal. 159, there was an appeal from the judgment, and from all orders of the district court made and entered in the action, jointly and severally, either before or after the judgment. As to the latter, the notice was held insufficient. The former was dismissed as not taken in time.

In Flateau v. Lubeck, 24 Cal. 366, there were two appeals noticed in one paper. The notice was objected to as insufficient, because it did not sufficiently show that the judgment and order mentioned in the notice were the same as those appealed from. The court held the contrary. No point was made that the notice was insufficient because it recited two appeals in one instrument.

In the cases above cited we have but little doubt that in most of them the notice of the appeals in the cause was contained in one instrument.

The court in its comments on the sentence from the opinion in People v. Center, above quoted, says:

"Every judgment and order subsequent to judgment entered against a party if the subject of a distinct and separate appeal, and must be appealed from as an entirety. No separate appeal lies from parts of two judgments; each should be appealed from by a notice and an undertaking of its own: Code Civ. Proc., sec. 936; Sweet v. Mitchell, 17 Wis. 129; Skidmore v. Davies, 10 Paige, 316; and while one notice is sufficient for taking an appeal from a judgment and an order subsequent to judgment, yet each should be reviewed on a complete record of its own, to be made up and filed according to section 950, code of civil procedure, if the appeal be from a judgment, or according to section 956, *supra*, if from an order subsequent to the judgment. The judgment roll on appeal from an order subsequent to judgment is entirely different from the judgment roll of an appeal from the judgment: Bodley v. Ferguson, 25 Cal. 584; Wetherbee v. Carroll, 33 Id. 554; Code Civ. Proc., sec. 951. And if the undertaking and transcript belonging to each are not filed in due time, the respondent is entitled to a dismissal of the appeal."

The proposition announced in the first sentence of the foregoing paragraph is not exactly correct, as there can be an appeal from parts of a judgment or order: Code Civ. Proc., sec. 940. The second sentence in the paragraph is correct. When it is said that no separate appeal lies from parts of two judgments, the meaning, we suppose, is that there cannot be one appeal from parts of two judgments. Certainly there must be an appeal from each judgment or a specific part of it.

We cannot construe this to mean that the notice of the two appeals may not be in one and the same instrument. The notice of appeal was so drawn in Horn v. Volcano Water Co., 18 Cal. 143, and no objection was taken to it on that ground.

There certainly should be a notice and undertaking on appeal on each appeal, but this is not saying that they cannot be given in the same instrument of writing.

The court then proceeds to discuss the matter of the record, and remarks that "while one notice is sufficient for taking an appeal from a judgment and order subsequent to judgment, yet each should be reviewed on a complete record of its own, to be made up and filed according to section 950, *supra*, if the appeal be from a judgment, or according to section 956 of the code of civil procedure, if from an order subsequent to the judgment."

But it is not said or is it intended that the record of each appeal may not be in one transcript. If it is intended to say that there must be one transcript for each it is contrary to the practice of the court from the earliest existence of a supreme court in this state to the present time. Since the decision in People v. Center, the case of Emeric

v. Alvarado, 64 Cal. 529, 1 West Coast Rep. 708, has been before this court and decided, in which there were five appeals, and there was but one transcript. A motion was made to dismiss appeals in that case, but not on the ground that there was not a transcript for each appeal

It is said further by the court that "if the undertaking and transcript belonging to each are [each] not filed in due time, the respondent is entitled to a dismissal." But according to the practice of this court, from the beginning, an undertaking belonging to each appeal was filed in time, though there were several appeals, and the undertaking for each was in one paper. The same may be said of the transcript. The transcript of each appeal is filed in time, though one transcript contains the record of several appeals. The transcript must, however, comply with the rules of this court.

What is said in paragraph 4 of the opinion in People v. Center, pertains to one of the printed rules (No. 6) of this court. We say that it is a decision under the rule, for the reason that we know of no authority to dismiss an appeal for confusion in the transcript, when there can be found in such transcript all that the statute requires, except this rule.

A practice continued for many years in the highest court of the state, passed without observation impugning its correctness, is very strong and cogent, if not conclusive, evidence that such practice is in accordance with law. It should not be considered as overruled by expressions in an opinion which can be readily reconciled with it, especially when the court does not expressly refer to the former practice and announce a change.

For the reasons above given we cannot construe People v. Center as holding there must be in any case a separate transcript for each appeal taken.

In the case before us there is a notice of appeal for each appeal. There is but one transcript, but the record upon which each appeal shall be heard is as clearly distinct as if set forth in separate transcripts for each.

We cannot think that the court intended by its judgment in People v. Center to introduce a new rule of practice as to the notice of appeal, undertakings, and transcript. The transcript in that case was peculiar, *sui generis*, from the confusion apparent on the face of it, and the remarks of the court concerning the transcript apply to such a case.

We are more convinced that the court did not intend to introduce any new rule as to the notice of appeal from one of the cases cited in the paragraph last quoted, following the words, "Each should be appealed from by a notice and undertaking of its own." We refer to the case of Skidmore v. Davies, 10 Paige, 316. The court in the case cited says: "When several distinct decisions and orders have been made by the court below in the same suit and between the same parties, it is sometimes permitted to the party who considers himself aggrieved by such decisions to contain them all in the same notice of appeal. But when the proceeding is in the nature of a separate and distinct appeal from

each order, as in this case, the appellant must either execute a separate appeal bond upon the appeal from each order, or he must give one bond on the appeal with a penalty sufficiently large to cover the appeals from both orders, and with a condition to embrace the damages and costs of both," citing Tyler v. Summers, 6 Paige, 127. The above language justifies the practice in this state both as to notice of appeal and undertaking. The appeal was dismissed in this case because there were two orders appealed from and but one bond for one hundred dollars was given. Such a bond was required on each appeal, and not being given the appeal was dismissed. So in Bornheimer v. Baldwin and Horn v. Volcano Water Company, *supra*. The notice of appeal referred to two subjects of appeal and only one undertaking was given referring to one appeal.

All the appeals were dismissed, but only one of them, the one not referred to in the undertaking, was dismissed for lack of such undertaking.

In the other case cited, from Wisconsin, the ruling turned on the peculiar statute of that state as to a return to each order appealed from. The statute of Wisconsin requires a separate return to each order. This appears from the opinion. The court in Wisconsin is of course well acquainted with their practice, but we cannot perceive from what is said in the case why the record in each appeal may not be printed in one transcript. If more than one transcript is required from appeals made from the judgment and other orders in a case, it seems to us that it must constitute an exception among the appellate tribunals of the several states where the reformed procedure has been adopted.

The only point made by respondent's counsel on the motion to dismiss the appeals was that two separate and distinct appeals cannot be brought to this court on a single notice and undertaking, and on a single transcript. It will be observed notice, undertaking, and a single transcript are connected by the copulative conjunction. If either one was defective the point was well taken.

Now when the court made the remark embraced in the sentence commencing with the words "an appeal cannot be taken from parts of two judgments," etc., it had really decided that the appeals must be dismissed and on grounds sustained by the uniform ruling of this court. There were five appeals (not four as stated in the opinion), one from the final judgment of November 8, 1878, another from portions of the special judgment entered November 9, 1879, still another from an order made October 3, 1879. There was a fourth appeal from an order entered October 31, 1879, denying a motion for a new trial, and still another from an order made and entered November 15, 1879, striking from the files a notice of intention to move for a new trial. In these appeals one undertaking for three hundred dollars had been filed on the three appeals, and one undertaking for a like sum on last appeals mentioned. The undertakings, as we have seen, were ambiguous in their reference to the appeals, and the appeals were dismissed

for want of a proper undertaking on appeal. It was unnecessary to say anything in regard to the transcript.

We will add here that there are rarely two transcripts brought up to this court in any one cause. We recollect of none, unless where there are cross appeals. We would be setting form above substance were we to hold that the notice and undertakings on appeal in this case are not sufficient. The rule of law is imperative in requiring that form shall yield to substance.

The order denying the motion to dismiss the appeals in this cause heretofore made will stand unchanged. So ordered.

MORRISON, C. J., and SHARPSTEIN, MCKINSTRY, and MYRICK, JJ., concurred.

ROSS, J., concurring. I concur in the judgment and in the opinion of Mr. Justice Thornton, except in so far as it approves what is said in the case of People v. Center, 61 Cal. 191. I was unable to agree with the court in that case.

MCKEE, J., dissenting. I adhere to the views expressed in the opinion which I came to on the former hearing in this case, 6 West Coast Rep. 865, and for the reasons therein set forth, I think that the appeals taken from the decretal order awarding alimony, and from the final judgment of divorce, were improperly taken and should be dismissed.

WEST COAST REPORTER.

WHOLE No. 108. JANUARY 21, 1886. VOL. VIII. No. 12.

CIRCUIT COURT, DISTRICT OF COLORADO.

PATERSON ET AL *v.* MATER ET AL.

December 31, 1885.

UNDERTAKING FOR RETURN OF PROPERTY TAKEN FROM MARSHAL—ACTION ON—JURISDICTION OF FEDERAL COURTS.—Goods in possession of a marshal of the United States cannot be taken in replevin by process from a state court. Where such a proceeding is attempted an undertaking given for the return of the goods may be treated as a forthcoming bond, on which the marshal may maintain an action in his own name in the federal court, and this irrespective of the question of the citizenship of himself and the obligors in the bond. So may any one beneficially interested in the bond. Jurisdiction in such subordinate and ancillary proceedings rests upon the jurisdiction acquired in the original action.

ON motion for a new trial.

F. M. Hardenbrook, for the plaintiffs.

Charles I. Thomson, for the defendants.

BREWER, Circuit Judge. I see nothing in the motion for a new trial that calls for hesitation or admits of doubt.

The replevin proceedings by DeWalt were unwarranted. Goods in possession of a marshal of the United States cannot be taken in replevin by process from a state court: Freeman v. Howe, 24 How. 450.

Where such a proceeding is attempted an undertaking given for the return of the goods may properly be treated as nothing more than a forthcoming bond, a mere incident to the action in which possession of the goods was taken by the marshal. In such a case the marshal may maintain an action in his own name in the federal court, and this irrespective of the question of the citizenship of himself and the obligors in the bond. So may any one beneficially interested in the bond. Jurisdiction in these subordinate and ancillary proceedings rests upon the jurisdiction acquired in the original action. Further, the marshal is a mere nominal party, having no pecuniary interest. The plaintiffs, citizens of a state other than that of the obligors, are alone beneficially interested—as such they may sue in the federal courts with and probably without an assignment: Brown v. Strode, 5 Cranch, 303; Bank v. Lowry, 14 Pet. 293; McNutt v. Bland, 2 How. 9; Coal Co. v. Blatchford, 11 Wall. 172; Huff v. Hutchinson, 14 How. 586; Walden v. Skinner, 101 U. S. 588.

The motion for a new trial will be overruled.

SUPREME COURT OF NEVADA.

STATE EX REL. WILLIAMS ET AL. *v.* COUNTY COMMISSIONERS.

Filed December 31, 1885.

CONSTITUTIONAL LAW—WHEN ACT SHOULD BE HELD UNCONSTITUTIONAL.—An act of the legislature which is not prohibited by the express words of the constitution, or by necessary implication, ought not to be declared void as in violation of that instrument. It is only in cases where the provisions of the statute manifestly infringe upon the provisions of the constitution that courts are authorized to declare the statute void.

THE SAME—LOCAL AND SPECIAL LAWS—ACT FIXING COMPENSATION FOR COUNTY OFFICERS.—The prohibition in section 20, article 4, of the constitution, against the passage of local or special laws "for the assessment and collection of taxes for state, county, and township purposes," was only intended to apply to laws regulating the method of assessment and collecting taxes for the purposes of general revenue, and should not be construed as a prohibition upon the power of the legislature to delegate authority to the county commissioners to fix the rate of taxation for county purposes in the several counties. And the act of 1885, "regulating the compensation of county officers in the several counties," does not, and was not intended to, impose a tax for revenue purposes, and consequently is not obnoxious to section 20, article 4, of the constitution. That such was not the intention of the constitutional convention is shown upon a review of the debates in that body in connection with such section.

THE SAME.—The legislature has power to pass local or special laws regulating the compensation of county officials; and the act of 1885, in so far as it relates to Washoe county, is constitutional.

APPLICATION for *mandamus*. The opinion states the facts.

J. F. Alexander, for the petitioners.

R. H. Lindsay, for the respondent.

HAWLEY, J. Relator Williams is county recorder and *ex officio* county auditor of Washoe county, and relator Alexander is district attorney of said county. They ask that the writ of *mandamus* be issued to compel the county commissioners to pass and allow certain claims, presented by them in their official capacities, which they insist they are entitled to under the amendatory act to regulate the salaries of county auditors, "approved March 10, 1879" (Stat. 1879, 126); the "act to regulate fees and compensation for official and other services," approved February 27, 1883 (Stat. 1883, 62. sec. 10); the "act fixing the salaries of certain county officers," approved March 7, 1883 (Stat. 1883, 114); and the act relating to state and county revenue, approved March 9, 1865 (Stat. 1865, 271). They contend that the fees and compensation of county officers which are collected for a public service is a tax, and base their claim for salary and fees, under the acts above mentioned, upon the ground that the "act regulating the compensations of county officers in the several counties of this state, and other matters relating thereto," approved March 11, 1885 (Stat. 1885, 85), is in violation of section 20, article 4, of the constitution, which prohibits the legislature from passing any local or special laws "for the assessment and collection of taxes for state, county, and township purposes." In support of this position they cite and rely upon the decision of the court in Manning v. Klippel, 9 Or. 373.

Upon the oral argument certain objections were urged against the entire act of 1885; but in considering the questions involved, we shall

limit the discussion to that portion of the act which relates to Washoe county, as that is complete in itself, and is independent of the provisions which relate solely to other counties.

Did the framers of the constitution intend that the clause prohibiting local and special laws for the assessment and collection of taxes should apply to fees and compensation of county officers?

Is it within the power of the legislature to enact local or special laws providing for and regulating the fees and compensation of county officers?

It must be conceded that the fees and compensation of county officers is to some extent in the nature of a tax upon the citizens of the county. The word "tax" has many meanings, and in its broadest significance includes fees, costs, and all other pecuniary burdens imposed upon the people under authority of law. But it does not follow—because taxes might in a certain sense include fees—that such was necessarily the intention of the framers of the constitution by the language used in the section referred to. License fees are often imposed under the general power of taxation; but they are sometimes imposed under the police power, and it is always the duty of courts, when the question is raised, to determine under which head the fees are to be classed, as the rules of the law governing the one do not necessarily control the other.

An act of the legislature which is not prohibited by the express words of the constitution, or by necessary implication, ought not to be declared void as in violation of that instrument. It is only in cases where the provisions of the statute manifestly infringe upon the provisions of the constitution that courts are authorized to declare the statute void.

Neither fees, salaries, nor compensation of county officers are named, or necessarily implied, in the provisions of section 20. These terms would not generally be understood as relating to the "assessment and collection of taxes." Taxation is a tribute for the support of the government, imposed on property, in return for the protection and advantages which the government affords to the owner. It is an essential and fundamental requisite in the exercise of the power of taxation that the burden should be imposed or apportioned, with all practicable equality and justice, upon a uniform rule. The prohibition in section 20, against the passage of local or special laws "for the assessment and collection of taxes for state, county, and township purposes," was only intended to apply to laws regulating the method of assessing and collecting taxes for the purpose of general revenue, and even as to that purpose neither this provision, nor the provisions of section 1, article 10, have ever been construed, and in the light of the contemporaneous legislation upon this subject, should not be construed as a prohibition upon the power of the legislature to delegate authority to the county commissioners to fix the rate of taxation for county purposes in the several counties. This tax has never been uniform throughout the state. It has always been regulated with reference solely to the condition of the counties, and the rate is fixed in each county without

reference to the rate established in others. The act of 1885, "regulating the compensation of county officers in the several counties of this state," does not impose a tax for revenue purposes, and was not intended to have that effect.

This question was decided in State ex rel. Attorney-General v. The Judges, 21 Ohio St. 11, where it was contended by counsel that the fees and charges exacted under an act limiting the compensation of certain officers were in the nature of a tax for the purpose of raising general revenue. The court, in discussing the provisions of the act, said:

"The plain design of the act is not to tax those requiring official services, for the purpose of general revenue; but to require payment of a reasonable compensation for the facilities afforded and the services performed. If, in the practical operation of the act, the effect should be to leave a surplus for the use of the county—which is contingent—this would result from the difficulty found in prescribing such rates of charges as to make the receipts exactly correspond with the cost of maintaining the offices. Exactness of correspondence in this respect cannot be attained; but experience, and the keeping accounts of the receipts of the various offices, will enable this end to be accomplished by reasonable approximation. . . . . It is competent for the legislature to provide for compensating all public officers by salaries. If it should see proper to do so, we know of no provision of the constitution that would forbid exacting from persons requiring and who are especially benefited by the performance of official services, a reasonable compensation therefor, to paid into the public treasury to reimburse the public for the expense incurred in providing and maintaining such offices. It is not essential to such exactions that they should inure to the personal benefit of the officer. The officers are but the agents of the state for transacting the public business; and it is, in its nature, a matter wholly immaterial to those requiring their services, whether the amount to be paid therefor goes to the officer, or into the public treasury, provided no more is exacted than is just and reasonable for the facilities afforded and the services performed. If the exactions are called taxes, they become none the less such, as to those on whom they are imposed, by being paid to the officer, than if paid into the public treasury:" See also State v. Ream, 16 Neb. 685.

These views are decisive of the question under consideration; but there is another method of arriving at the intention of the members of the constitutional convention in inserting the various provisions of section 20, prohibiting local and special legislation which will bring about the same result. We refer to the aid given by an examination of the debates in the convention upon this subject. Where "the proceedings clearly point out the purpose of the provision, the aid will be valuable and satisfactory:" Cooley's Const. Lim. 66.

When section 20 was presented in the convention, it prohibited the legislature from passing local or special laws "regulating the election of county and township officers, and their compensation, for the assess-

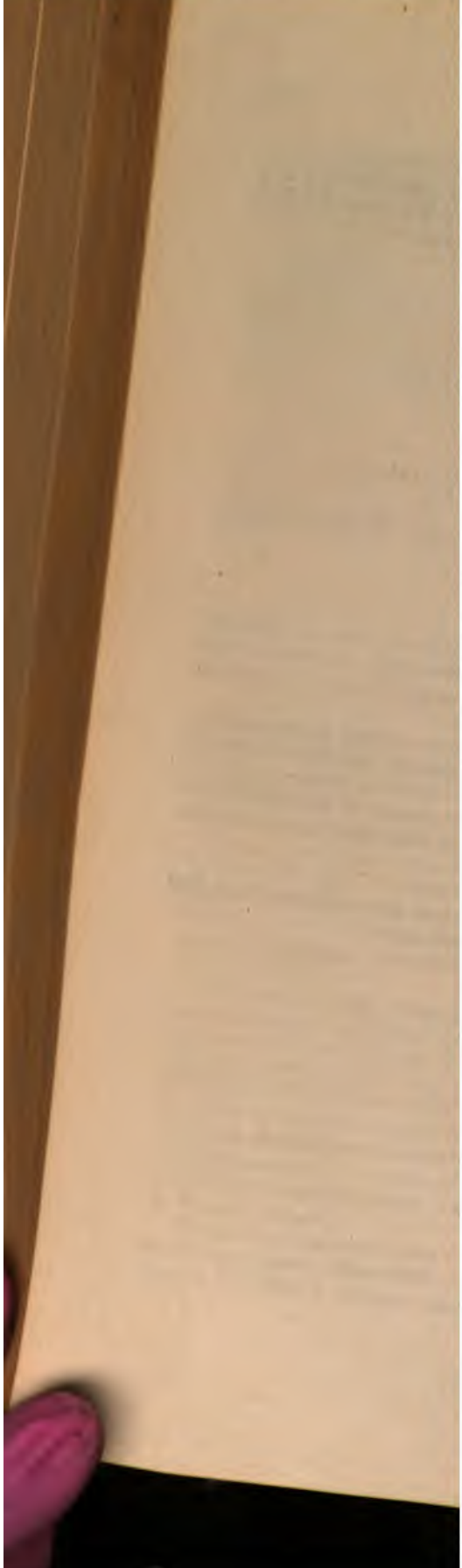
ment and collection of taxes for state, county, and township purposes, in relation to fees and salaries:" Const. Deb. 146, 147.

Mr. Frizell rose for information, and said: "This section says that the legislature shall not pass local or special laws in certain cases, and then the cases are enumerated. One clause of it seems to refer to the fees and salaries of county officers. Now it appears to me that although it might be possible to fix the fees of officers at a uniform rate, yet in cases where they are paid by salaries, those salaries must necessarily be different. In the county of Storey, for example, the county officers should have greater salaries than the same officers should be allowed in the county of Churchill, or some of the other counties." Mr. Banks, in reply, contended that a general law could be passed that would provide equitably for the salaries of the officers "in different counties where the duties are different;" that the legislature could abolish the fee system, and adjust the salaries of the officers; "that where the receipts are greater, the salaries should be greater in proportion;" that the fees collected should be paid into the county treasury, and the salary regulated by the amount of the fees paid; "that in that way they could have a general law which would be adapted to the wants of each particular county, no matter what amount of business was done in such county."

When the question recurred on the adoption of the original section, Mr. Frizell moved to amend it by striking out after the words "county and township offices" the words "and their compensation;" also, by striking out the words "in relation to fees and salaries;" and in support of his motion said: "I do not think that any law can be made which will bear uniformly in regard to the fees and salaries of officers in this proposed state. I do not think that any general law can reach that subject fairly, if a general law can be made to reach it at all. . . . . I think the subject is sufficiently regulated in section 21, which follows, where it is made obligatory on the legislature to make all laws uniform and general in their operation in all cases where general laws can be made applicable. But, conscientiously speaking, I do not see that any general law can operate uniformly and correctly in this matter of the compensation of officers, and therefore I proposed to strike out those words." The question was taken, and the amendment was agreed to: Const. Deb. 152.

From this it will be seen that the question whether the legislature should be prohibited from passing local or special laws in relation to this subject was fully discussed and fairly presented. The fact that all clauses relating to this subject were excluded in expressing the will of the convention is significant. The adoption of the amendments furnishes very strong evidence, and considered in connection with the reasons given therefor, it becomes conclusive, that the members did not intend to place any restrictions upon the power of the legislature in regulating the fees and compensation of county officers by any of the provisions enumerated in section 20.

Section 21 provides that "in all cases enumerated in the preceding



petition, for services rendered by them during the period of time between the decision of this court in State ex rel. Attorney-General v. Boyd, 19 Nev., 5 West Coast Rep. 464, and the approval of the act of 1885. This position cannot be maintained. That decision related to the provisions of the act of 1883, attempting to make the treasurer of Washoe county *ex officio* assessor, and it was decided that the act, in so far as it established a "difference in the government of Washoe county from that of the other counties in the state, violates the uniformity contemplated by the constitution" in section 25, article 4. The decision did not affect the provisions of the act which related to the compensation of the county recorder and district attorney. The allowance to these officers for that period should be made under the provisions of that statute: Stat. 1883, 73.

We are of opinion that the legislature of this state has the power to pass local or special laws regulating the compensation of county officers; that the act of 1885, in so far as it relates to Washoe county, is constitutional; and that the respondents were justified in refusing to allow the claims presented by the relators.

The writ of *mandamus* is denied.

RULES OF CONSTRUCTION AS TO CONSTITUTIONALITY OF STATUTE: See State ex rel. Cardwell v. Glenn, 1 West Coast Rep. 50; Carpentier v. People ex rel. Tilford, 5 Id. 553; People ex rel. Robertson v. Van Gashin, Id. 651.

REINHART ET AL. *v.* BRADSHAW.

Filed January 8, 1886.

PRE-EMPTION—LAND IN OCCUPANCY OF ANOTHER.—The right to pre-empt public lands cannot be exercised upon land occupied by another.

THE SAME—PRE-EMPTION BY TENANT IN COMMON.—The possession of one tenant in common of public lands inures for the benefit of his co-tenant. Consequently, the tenant in possession cannot acquire a right of homestead to such lands.

APPEAL from a judgment of the fourth judicial district court, Humboldt county, entered in favor of the defendant. The opinion states the facts.

W. E. F. Deal and *MacMillan & Hannah*, for the appellants.

M. S. Bonnifield and *R. M. Clarke*, for the respondent.

BELKNAP, C. J. The parties hereto were tenants in common of the tract of land in controversy. At the time plaintiffs acquired their interest defendant was residing upon the premises. In consideration of his occupancy and of the use of certain farming implements and horses owned by the parties as tenants in common, and of other matters immaterial here, defendant agreed to cultivate the land and return plaintiffs one fourth of the crop of grain grown thereon. Under the agreement, defendant occupied and cultivated the land for two seasons,

and engaged to do so for a third, but during the third season, and on or about the thirty-first day of July, 1882, plaintiffs learned from defendant, for the first time, that his cultivation of the land was not for their use or benefit as during the preceding seasons, and that he had on the twenty-first day of January preceding preferred a claim to the land under the homestead laws of the United States. Upon these facts, plaintiffs brought the present action of ejectment. Defense is made upon the homestead claim. The case presents but a single point, Was the land subject to pre-emption? In other words, can a tenant in common acquire a right of homestead to government land of which he is in the possession for himself and his co-tenants?

In Nickals v. Winn, 17 Nev. 188, the plaintiff was in possession of a large tract of the public land. He neglected to avail himself of his right to purchase in preference to others, and Winn, taking advantage of the situation, undertook to purchase one hundred and sixty acres thereof from the government. It was held, upon the authority of Atherton v. Fowler, 96 U. S. 513, and other decisions referred to in the opinion, that the right of pre-emption could not be exercised upon the land occupied by another. "The generosity by which congress gave the settler the right of pre-emption," said the court in that case, "was not intended to give him the benefit of another man's labor, and authorize him to turn that man and his family out of their home. It did not propose to give its bounty to settlements obtained by violence at the expense of others. The right to make a settlement was to be exercised on unsettled land; to make improvements on unimproved land. To erect a dwelling-house did not mean to seize another man's dwelling. It had reference to vacant land, to unimproved land; and it would have shocked the moral sense of the men who passed these laws if they had extended an invitation to the pioneer population to acquire inchoate rights to the public lands by trespass, by violence, by robbery, by acts leading to homicides and other crimes of less moral turpitude."

The present action is sought to be distinguished from Atherton v. Fowler, and kindred cases, upon the ground that the defendant was not personally in the actual possession of the premises at the time of the eviction.

The parties being tenants in common, the possession of the defendant was for the benefit of his co-tenants as well as himself. Occupied lands are exempted from the provisions of the exemption laws, upon the presumption that congress could not have intended to invite the disorder and violence which would follow the invasion of homes made by settlers upon the public lands. The evils against which the rule is directed are subject to occur where lands are held by such a constructive occupancy as the facts of this case present, and we think it falls within the principle ruled in the class of decisions upon which Nickals v. Winn is based.

Counsel for appellant, has referred us to the case of Emerson v. Sansome, as opposing this view. That case was decided before the decision in Atherton v. Fowler established the contrary doctrine.

The judgment of the district court must b
remanded, with instructions to enter a judgm
tiffs for the possession of the demanded pre
as tenants in common, and for costs. It is so

SUPREME COURT OF CAL

No. 9,839.

LITTLE *v.* JACKS.

In Bank. Filed January 16,

REARGUMENT ORDERED.

APPEAL from a judgment of the superior c
The prior opinion is reported *ante*, p. 432.

S. O. Houghton, for the appellant.

D. M. Delmas, for the respondent.

By the COURT. The court is satisfied with
on the point considered in it: 8 West Coast
several former decisions, and there is none
our notice, or of which we are aware.

But there is a point which the court wish
whether respondent waived his right to obj
filing the undertaking on appeal before servi
by a stipulation in writing that the cause be
this court for hearing for a day referred to in
case entitled Bucknall v. Huntsman.

To this point the reargument will be limit

And it is ordered that the cause be placed
Monday in February, 1886, for such reargu

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...at the fees and compensation of county officers
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...es for the purpose of general revenue, and even as to that
...er this provision, nor the provisions of section 1, article 10,
...en construed, and in the light of the contemporaneous
...n this subject, should not be construed as a prohibition
...r of the legislature to delegate authority to the county
...to fix the rate of taxation for county purposes in the
...s. This tax has never been uniform throughout the con-
...lways been regulated with reference solely to the con-
...nties, and the rate is fixed in each county without

WEST COAST RI

WHOLE NO. 109. JANUARY 28, 1886.

CIRCUIT COURT, DISTRICT OF

YICK WO *v.* PATRICK CR

January 20, 1886.

JURISDICTION TO ENJOIN PROCEEDINGS IN STATE CO
court has no authority to restrain the chief of police of
rants of arrest issued by the police court upon criminal
nances, alleged to have been passed in contravention of t
constitution of the United States, and of the stipulation
SECTION 720 OF THE REVISED STATUTES prohibits the
proceedings in the state courts.

Before SAWYER, Circuit J

Hall McAllister, D. L. Smoot, and *L. H. V*
plainant.

Alfred Clarke, for the respondent.

SAWYER, Circuit Judge, orally. In the bil
that Patrick Crowley, respondent, is chief o
county of San Francisco, and that he has certa
which he is about to arrest complainant, a citi
number of other Chinese subjects, upon the cl
ordinances adopted by the board of super
county, which he alleges to have been pas
fourteenth amendment to the national consti
lations of the treaty between the United St
China. Complainant sues on behalf of hims
fifty others, and prays, "that the said Patrick
as aforesaid, may be enjoined and restrained f
or otherwise, the aforesaid ordinances, to wit,
section 1 of order 1569, and sections 67 and 6

Section 720 of the revised statutes is as follo
tion shall not be granted by any court of th
proceedings in any court of a state, except in ca
may be authorized by any law relating to pro

This provision was carried into the revised s
of March 2, 1793, expressly prohibiting any int
national court with proceedings in the courts o

WEST COAST REPORTER.

WHOLE No. 109. JANUARY 28, 1886. VOL. VIII. No. 13.

CIRCUIT COURT, DISTRICT OF CALIFORNIA.

YICK WO *v.* PATRICK CROWLEY.

January 20, 1886.

JURISDICTION TO ENJOIN PROCEEDINGS IN STATE COURT.—The United States circuit court has no authority to restrain the chief of police of San Francisco from serving warrants of arrest issued by the police court upon criminal charges for violating city ordinances, alleged to have been passed in contravention of the fourteenth amendment of the constitution of the United States, and of the stipulations of our treaty with China.

SECTION 720 OF THE REVISED STATUTES prohibits the issue of injunctions to restrain proceedings in the state courts.

Before SAWYER, Circuit Judge.

Hall McAllister, D. L. Smoot, and *L. H. Van Schaick,* for the complainant.

Alfred Clarke, for the respondent.

SAWYER, Circuit Judge, orally. In the bill, the complainant alleges that Patrick Crowley, respondent, is chief of police of the city and county of San Francisco, and that he has certain warrants, by virtue of which he is about to arrest complainant, a citizen of China, and a large number of other Chinese subjects, upon the charge of violating certain ordinances adopted by the board of supervisors of said city and county, which he alleges to have been passed in violation of the fourteenth amendment to the national constitution, and of the stipulations of the treaty between the United States and the empire of China. Complainant sues on behalf of himself, and one hundred and fifty others, and prays, "that the said Patrick Crowley, chief of police, as aforesaid, may be enjoined and restrained from enforcing, by arrest or otherwise, the aforesaid ordinances, to wit, section 1 of order 1559, section 1 of order 1569, and sections 67 and 68 of order 1587."

Section 720 of the revised statutes is as follows: "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

This provision was carried into the revised statutes from the statute of March 2, 1793, expressly prohibiting any interference on the part of a national court with proceedings in the courts of a state. That statute

has been construed a great many times by the supreme court. As early as 1807 the case of Diggs v. Wolcott, 4 Cranch, 179, arose in which an action was brought in a state court upon a certain instrument in writing. The defendants afterward brought suit in chancery in the state court to cancel the instrument and enjoin the proceedings in the case.

The chancery suit was removed to the United States circuit court, where a decree was entered enjoining the proceedings in the state court. On the appeal the court says: "The case was argued upon its merits by C. Lee and Swann, for the appellants, and by P. B. Key, for the appellee; but the court being of opinion that a circuit court of the United States had no jurisdiction to enjoin proceedings in a state court, reversed the decree."

That decision has since been followed in a great many cases, arising under a great variety of circumstances; as in United States v. Collins, 4 Blatchf. 156; Fisk v. U. P. R. Co., 6 Id. 399; Riggs v. Johnson County, 6 Wall. 195; Orton v. Smith, 18 How. 265, 266; Slaughter House Cases, 10 Wall. 298; Deal v. Reynolds, 96 U. S. 340; Peck v. Jennis, 7 How. 625; Haines v. Carpenter, 91 U. S. 257, and many others in the circuit and supreme courts.

There are other cases, however, not necessary to notice here, limiting the provision and rule, to proceedings *first commenced* in the state court, and where a United States court has first obtained jurisdiction over the parties, and the subject-matter, holding, that it is entitled to proceed to the conclusion and execution of its judgment, unaffected by any subsequent proceedings in a state court of co-ordinate jurisdiction; and that, to enable it to give effect to its proceedings in such cases, may even enjoin adverse proceedings in a state court.

In the bill, this court is asked to restrain the execution of process issued by a state court and placed in the hands of the chief of police, whose duty it is to execute that process. The service of process is a *proceeding* in the court. But in Riggs v. Johnson County, *supra*, the court says: "State courts are exempt from all interference by the federal tribunals, but, they are destitute of all power to restrain either the process, or proceedings in the national courts. Circuit courts and state courts act separately and independently of each other, and in their respective spheres of action, the *process* issued by the one, is as far out of the reach of the other as if the line of division between them was traced by landmarks and monuments visible to the eye."

In the case of United States v. Collins, *supra*, it is held that *no process* of a state court, preliminary to the final determination of the case, can be stayed by injunction issued out of a United States court. The court says: "The fifth section of the act of March 2, 1793, prohibits the courts of the United States from granting an injunction to stay proceedings in any court of a state. This term 'proceedings' may, properly, and I think must, necessarily, include all steps taken by the court, *or by its officers under its process*, from the institution of the suit until the close of the final process of execution, which may issue therein."

The supreme court, has, likewise held, that a national court cannot directly restrain a state court, but cannot restrain its ings even by an injunction issued against the parties to a sui state court. In Peck v. Jenness, 7 How. 625, the court say fact, therefore, that an injunction issues *only to the partie* the court, *and not to the court*, is no evasion of the difficulties the necessary result of an attempt to exercise that power over who is a litigant in another and independent forum.

"The act of congress of the second of March, 1793, declare writ of injunction shall not be granted 'to stay proceedings court of a state.' In the case of Diggs v. Wolcott, 4 Cranch, decree of the circuit court had enjoined the defendant from pr in a suit pending in a state court, and this court reversed th because it has no jurisdiction, to enjoin proceedings in a stat

As recently as the case of Haines v. Carpenter, 96 U. S. same doctrine was announced in the following language: "In place, the great object of the suit is to enjoin and stop litigatio state courts, and to bring all the litigated questions before th court. This is one of the things which the federal courts are e prohibited from doing. By the act of March 2, 1793, it was that a writ of injunction shall not be granted to stay proceedi state court. This prohibition is repeated in section 720 of the statutes, and extends to all cases except where otherwise provi the bankrupt law. This objection alone is sufficient ground taining the demurrer to the bill."

In that case it was attempted to restrain the state court thr injunction against the parties; and the supreme court holds t cannot be done. The same doctrine was repeated in Dial v. I 96 U. S. 340.

The proceedings, which are here sought to be restrained, are p ings in a state court, in which warrants have been issued aga complainant, and many others, and placed in the hands of th tive officer of the court for service. It is sought to enjoin the of process, which would be to stay the proceedings, and prev court from acting in the case. This is clearly within the pro of the statute, as, repeatedly, construed by the courts; and th has no authority to restrain those proceedings. Within the las years a great many applications, under a great variety of stances, have been made to this court for preliminary injunct restrain proceedings in the state courts in civil causes, and the invariably, been denied.

This court has no authority to restrain proceedings *first com* in a state court, nor has a state court authority to restrain proc in this court. The court, therefore, has no jurisdiction to gr relief sought in this bill.

Let the order to show cause be discharged, and the applica an injunction denied.

The demurrer to the bill is also sustained for want of auth grant the relief sought, and the bill dismissed.

CIRCUIT COURT, DISTRICT OF OREGON.

UNITED STATES *v.* SINNOTT ET AL.

Filed January 11, 1886.

INDIAN SAW-MILL.—Lumber made at the saw-mill on the Grand Ronde Indian reservation is in fact the "property" of the Indians thereon, and not that of the United States, within the purview of section 3618 of the revised statutes; and the agent, subject to the instructions of the commissioner of Indian affairs, may dispose of any portion of the same and apply the proceeds to the support of the mill or otherwise for the benefit of the Indians, without reference to section 3617 of the revised statutes requiring money received for the use of the United States to be deposited to its credit.

DOUBLE PAYMENT OF SALARY.—The superintendent of Indian affairs in Oregon returned to the department two vouchers for the payment by him of the salary of the agent of the Grand Ronde reservation for the second quarter of 1873, each being marked "triplicate," from which the accounting officers assumed that the salary was paid twice, and charged the agent with the amount of such payments in the settlement of his official accounts: *Held*, 1. That on the face of the transaction it was apparent that these two papers were but parts of one voucher taken in triplicate, and that there was but one payment; and 2. That if there had been two payments, the agent, although liable for the excess, as an individual, as for money had and received to the use of the United States, was not liable therefor on his bond.

MONEY PAID BY AGENT WITHOUT AUTHORITY.—The defendant Sinnott employed a person on the reservation aforesaid as "superintendent of farms and mills," and in reporting the fact to the commissioner, said that he did so at the instance of "some political friends," but there was really no necessity for the employment, and advised that it be disapproved, which was done; but the agent continued the person in such employment and paid him therefor, and on settlement of his accounts at the treasury, one thousand five hundred dollars thereof was disallowed: *Held*, that the payments being not only without authority but contrary thereto, were illegal, and the agent and his sureties are liable therefor.

ACTION on official bond to recover money. The opinion states the facts.

James F. Watson, for the plaintiff.

William B. Gilbert, for the defendants.

DEADY, J. This action is brought on the bond dated March 5, 1872, of the defendant, Patrick B. Sinnott, as Indian agent at the Grand Ronde reservation, and of the defendants Luzerne Besser and E. Cahalin, as sureties therein, to recover a balance of three thousand and forty-eight dollars and eighteen cents, alleged and ascertained to be due the plaintiff thereon, at the United States treasury, March 21, 1885, on account of money and property received by said Sinnott under said bond and not duly accounted for, with interest from said date at the rate of six per centum per annum, and costs and disbursements.

The answer of the defendants consists of a denial of the failure of Sinnott to account and the correctness and justice of the settlement at the treasury.

The case was heard by the court without the intervention of a jury.

The sum sought to be recovered consists of these items; namely, 1. One thousand one hundred and seventy-nine dollars, the proceeds of the sale of certain lumber made at the Indian saw-mill; 2. Three hundred and seventy-five dollars, the amount of a second payment by the superintendent to the agent on his salary account, for the second quarter of the year 1873; 3. One thousand five hundred dollars paid to C.

D. Folger, between July 1, 1874, and August 25, 1876, as "supe ent of farms and mills," less a credit of five dollars and eig cents for an unexpended balance deposited to the credit of the States.

The mill at which the lumber was sawed was erected by the for the Indians of this reservation, in pursuance of the treaty Umpquas, of November 29, 1854 (10 Stats. 1125), and that v Molallas, of December 21, 1885 (12 Stats. 981), and in fact be them. And therefore, in my judgment, such lumber was "property" of the United States, within the purview of secti of the revised statutes, which requires the proceeds of any sale to be converted into the treasury; nor was the money received received "for the use of the United States," within the purviev tion 3617 of the revised statutes.

As the agent and guardian of the Indians, it was the duty defendant Sinnott, subject to the instructions of the commiss Indian affairs, to dispose of the lumber made at this mill, needed by the Indians for their own use, and to use or ap money or other property received therefor for their benefit.

This lumber was the product of Indian labor combined w labor and skill of white men, that the United States bound furnish them in consideration of the cession of their lands. not, then, properly speaking, the property of the United Stat certainly not within the contemplation of sections 3617 ar of the revised statutes. In this case it appears from the t statement and the defendant's accounts that in 1873 he receiv thousand and seventy-nine dollars and thirty-one cents from of lumber, of which he deposited to the credit of the United or in some way converted into its treasury, one hundred doll thirty-one cents, and used the remainder in payment of curr penses of the agency, including the wages of the sawyer and first charging himself with the amount received. At the time no instructions to make any other or special disposition of these and did not receive any until October, 1876, when he was ins to deposit the same to the credit of the United States.

In the second quarter of 1874 the defendant furnished two h dollars' worth of this Indian lumber for the building of the n labor school on the reservation, and paid for it out of the fun nished and designated for that purpose. The money received lumber he then applied to the payment of current expense charging himself with the amount, as in the case of the fu received in 1873.

It is objected that this transaction was contrary to section the revised statutes, prohibiting expenditures in any departm the government in excess of appropriations. But certainly th tion has no application in the premises. There is no questi that the money expended for the lumber for the labor sch appropriated for that purpose. And the agent had as much ri

use it in the purchase of material from the Indians as anyone. So that the item of two hundred dollars is in the same category as the one of nine hundred and seventy-nine dollars, and the question concerning both is, Was the money disbursed or accounted for according to law?

As I have said, in the absence of any instruction to the contrary, in my judgment it was; and the defendant Sinnott should be credited with the amount.

And even if the disposition of the money received from the sale of the lumber was a technical violation of section 3617 or 3618 of the revised statutes, there is no pretense but that the defendant acted in good faith, and the Indians, to whom the money really belonged, had the benefit of it. And therefore, upon any equitable view of the transaction, he is entitled to be credited with the amount: United States v. Roberts, 10 Fed. Rep. 540; United States v. Stowe, 19 Id. 807.

The item of three hundred and seventy-five dollars, for double payment of salary, is manifestly a mistake of the superintendent's. It is admitted that the superintendent, Odeneal, who was subpœnaed as a witness, but is unable to attend, would testify, if sworn, that he did not pay the salary twice. Sinnott swears positively that he never received the money but once, and there is nothing in the treasury statement to the contrary.

It appears from that that the superintendent paid the agent his salary for the second quarter of 1873, and took a voucher therefor in triplicate, and for some reason, or by mistake, sent two parts of such triplicate voucher, instead of one, with his accounts to the department.

Upon this the accounting officers have assumed, without, as it appears to me, any sufficient reason, that these two parts of one voucher relate to two different and distinct payments of the same amount for the same quarter's salary. Upon a parity of reasoning, if the superintendent had, for any cause, sent the three parts of this voucher to the department, the defendant would have been charged with receiving this salary thrice.

It is but fair to add that there is a slight difference in the language of these two papers, in the statement of the account—the one being for "salary" as Indian agent, etc., the other for "services rendered the Indian department," as Indian agent, etc. But their is no difference in the language of the receipt by Sinnott or the certificate of payment by the superintendent, and manifestly they are parts of one transaction and relate to but one payment.

It would be absurd, as well as unjust, to charge Sinnott with the wrongful receipt of three hundred and seventy-five dollars on any such state of facts as this. And if the accounting officers have erroneously credited the superintendent's account with this amount, as having been actually paid out by him, the agent is not responsible for the mistake.

And furthermore, if this salary had been paid to the agent twice, he would not be liable therefor on his bond. The security for the proper disbursement of this money is the bond of the superintendent—the

officer who received it for that purpose. The agent's bond covers all moneys that come "into his hands," as agent for the Indians, but not that which was paid to him, rightfully or wrongfully, as a compensation for his services.

He would be liable, of course, as an individual, for money had and received by him, by mistake or otherwise, that belongs to the United States, but not on his bond as agent; nor would his securities be liable therefor at all.

On July 2, 1874, Sinnott wrote to the commissioner of Indian affairs a statement of the employees engaged on the reservation. Among these was C. D. Folger, "superintendent of farms and mills," at a salary of one thousand dollars per annum—a place which seems to have been created for his benefit.

On the seventh of the same month he wrote to the commissioner that he "was induced" to employ Folger "by some political friends" of his, but that in his "judgment a superintendent of mills is unnecessary;" and that he "had better disapprove of the engagement of the superintendent of mills." And as to a superintendent of farms, he left that with the commissioner, saying, in a sentence that appears to lack something: "I attended to the business of farmer since I came here myself, and now that the farm is to be discontinued after harvest."

On July 25th the commissioner wrote in reply, disapproving of "the appointment of C. D. Folger" as unnecessary, the miller being sufficient to run the mill, and the agent to manage the farm.

But on September 5th he wrote again to the commissioner, urging the approval of Folger's employment; to which the commissioner replied on September 30, refusing to approve the same. And on March 9, 1875, the commissioner wrote again to the agent, calling his attention to the fact that Folger's name appeared in his report of employees for the third and fourth quarters of 1874 "as superintendent of farms and mills," and after referring to the correspondence between them on the subject, closed by saying: "You are now informed that vouchers for services performed by Mr. Folger will not be considered by this office." There is no pretense that Folger performed any service about the mill or farm, but it is claimed that he was of some use, or might have been, in showing the Indians the corners or boundaries of the allotments of lands which had lately been surveyed and assigned to them in severalty. He also acted as clerk for the agent, and in that capacity received and opened his official correspondence.

But the agent was not authorized to employ him in any capacity without the approval of the commissioner, and certainly there was no excuse for his doing so after the employment was expressly disapproved by the latter.

His excuse is that he never received the letter of March 9th, and he surmises and suggests that Folger may have suppressed it for fear of losing his place. And at his request a day was given him to produce Folger as a witness on this point. But the party, though living in the city, was not produced or examined. But the letter of September 30th

was sufficient, without anything further, to make the employment plainly illegal.

It is true that some of the payments, apparently amounting in all to six hundred and fifty-five dollars, were, on what was thought equitable ground, allowed by the Indian bureau, after being rejected by the treasury auditor. For instance, the two hundred and fifty dollars paid for the third quarter of 1874, which was allowed on the supposition that it might have been paid before the letter of September 30th reached the agent.

But this act of grace as to part of the disbursement, does not render any of it legal, and is no defense to a claim to recover the balance.

The money was not only disbursed without authority, but directly in the face of it; and what is more, with the admitted knowledge that the employment was merely to serve the interest of or oblige "some political friends," and not the public good.

The plaintiff is entitled to a judgment against the defendants for this sum, less the credit of five dollars and eighty-two cents, with interest, in all one thousand five hundred and sixty-five dollars and fourteen cents, with costs and disbursements.

UNITED STATES *v.* SINNOTT ET AL.

Filed January 11, 1886.

JUDGMENT ORDERED FOR PLAINTIFF, for reasons stated in foregoing opinion.

ACTION on official bond to recover money.

James F. Watson, for the plaintiff.

William B. Gilbert, for the defendants.

DEADY, J. This action is brought on the bond, dated September 28, 1876, of the defendant, Patrick B. Sinnott, as Indian agent at the Grand Ronde reservation, and of the defendants, Nicholas B. Sinnott, Daniel Handley, and William W. Page, as sureties therein, to recover a balance of five hundred dollars, alleged and ascertained to be due the plaintiff thereon, at the United States treasury, on April 24, 1882, on account of money received by said Patrick B. Sinnott under said bond and not duly accounted for, with interest from said date at the rate of six per centum per annum and costs and disbursements.

The answer of the defendants consists of a denial of the allegations of the complaint, showing a breach of the condition of the bond.

The case was heard by the court without the intervention of a jury in conjunction with the foregoing one.

The sum sought to be recovered consists of two payments to C. D. Folger, as superintendent of farms and mills for the first and second quarters of the year 1876.

The money was paid contrary to the instruction of
sioner of Indian affairs, and was therefore illegally dis
opinion in the foregoing case of United States v. Sinnott
There must be judgment for the plaintiff for the sur
with interest from the date of settlement, amounting i
hundred and eighty-one dollars and twenty-five cents, wi
disbursements.

UNITED STATES v. HEILNER ET AL.

Filed January 15, 1886.

MEASURE OF DAMAGES IN ACTION FOR THE CONVERSION OF TIMBER.—A
chaser from a willful trespasser of timber cut on the public land is liable
the timber at the date of such purchase, including the value of all lab
which said trespasser had then bestowed upon it.

CASE IN JUDGMENT.—H. purchased fifty thousand feet of lumber at
made from timber willfully cut from the public land by the latter without
of H.; and hauled the same to Baker City, a distance of twenty miles, a
dollars per thousand, where he disposed of it at fifteen dollars per thous
in an action by the United States to recover damages for the conversion
the true measure thereof was the value of the lumber at the mill.

NEW TRIAL—INTEREST ON VALUE OF PROPERTY CONVERTED.—On the t
for granted that the lumber was delivered to the defendant at Baker Cit
took its value there as the measure of damages; but on a motion for a ne
admitted that the defendant paid for hauling the lumber to that place, a
being made to the omission to prove that fact on the trial, a new trial wa
defendant, unless the plaintiff would remit the cost of hauling, two hu
dollars, less one hundred and twenty dollars, the amount of three years'
value of the lumber at the mill, which the plaintiff had omitted to claim

ACTION to recover damages for conversion of timber.
states the facts.

James F. Watson, for the plaintiff.

Lewis L. McArthur, for the defendants.

DEADY, J. This action was brought January 2, 188
damages from the defendants for the wrongful taking and
boards of four hundred thousand feet of logs belonging
tiff, and wrongfully converting the same to their own use.

It is alleged in the complaint that between June 1, 1
commencement of this action, one O. T. Elliott wrongfu
removed from section 17, in township 7 south, of range 3
Wallamet meridian—the same being then unsurveyed pu
four hundred thousand feet of timber, made into saw-logs
eight hundred dollars, to a steam saw-mill in Baker cou
with intent to dispose of the same; that the defendants, w
the premises, took possession of said saw-logs, then and th
the value of one thousand two hundred dollars, and wr
the same on said mill into boards of the value of four thc
hundred dollars, and did then and there convert the same t
use, to the damage of the plaintiff four thousand eight hun

On June 2, 1884, the defendants answered separately, denying, substantially, any knowledge of the allegations of the complaint relative to Elliott's cutting and removing timber from the public land; and admitting that on and since October 1, 1882, they each had an interest in the steam saw-mill situate on or near the section aforesaid, but that about said date it was removed to land belonging to the defendants; and denying that they were in any way interested in the running of said mill between the time of acquiring said interests therein and its removal, or that they ever took possession of said logs or sawed that same into lumber, or converted the same to their use.

On the trial it appeared that in April, 1882, the defendant Heilner took a conveyance of the mill in question, it being then located on the unsurveyed public land and on or near this section 17, and the same day leased it to said Elliott for so much lumber—the transaction being, in fact, a mere security for the delivery to Heilner of lumber in payment of money theretofore advanced by him to Elliott; that in the summer of 1882 there was received, under said arrangement, by Heilner, at Baker City, from forty to sixty thousand feet of lumber, made from logs cut and taken from said section 17 by said Elliott, which was worth at the mill about ten dollars per thousand, and at Baker City, a distance of twenty miles therefrom, fifteen dollars per thousand; and that, although the defendants were then members of a mercantile firm at Baker City, the defendant Ottenheimer had no interest in the transaction.

The jury found for the defendant Ottenheimer and against the defendant Heilner, and assessed the plaintiff's damages by reason of the premises at seven hundred and fifty dollars.

Afterwards, counsel for Heilner made a motion for new trial, on the ground that the lumber was delivered by Elliott, and received by the defendant at the mill, and the latter paid the cost of hauling the same to Baker City, which was five dollars per thousand.

This fact did not appear on the trial, but the case was given to the jury on the supposition that Elliott delivered the lumber at Baker City. On this hypothesis the jury, taking the mean of the evidence—fifty thousand feet—as the amount of lumber received by Heilner, and its value at Baker City—fifteen dollars per thousand—properly assessed the plaintiff's damages at seven hundred and fifty dollars.

But the district attorney now concedes that the defendant did receive the lumber at the mill, and paid for hauling it to Baker City, where presumably it was disposed of by him, and finally converted to his own use.

But he also contends that Elliott, being a willful trespasser, the defendant is not only liable for the value of the timber at the mill, including the value of the labor put upon it by Elliott, but for the full value of the property at any time after it came into his possession and before this suit was brought for the conversion, which includes, of course, the cost of transportation from the mill to Baker City.

The rule for ascertaining the damages in such cases has been a vexed

question—the volume, if not the weight of authority, h value of the property at the time of conversion or appro use of the defendant, with interest thereon, constitutes t damages: Field on Damages, sec. 792.

But this includes any accession of value between th conversion.

Blackstone says that the rule of the Roman law had be adopted by Bracton and confirmed by the courts of Engla property receives "an accession by natural or artificial m growth of vegetables, the pregnancy of animals, the en cloth, or the conversion of wood or metal into vessels the original owner of the thing was entitled by his ri sion to the property of it under such its state of improv the thing itself, by such operation, was changed into a cies, as by making wine, oil, or bread out of another's gr wheat, it belonged to the new operator, who was only faction to the former proprietor for the materials whi converted:" 2 Bla. Com. 404.

And in Silsbury v. McCoon, 3 N. Y. 379, the court we held that when the taking was willfully wrong it ma the species has been changed, the wrong-doer acquires the article produced, so long as it can be shown that it w the material converted—as when corn is made into whis

But the rule laid down in Wooden Ware Company v. 106 U. S. 432, is of final authority in this court.

In that case it was held that in an action to recove timber cut and carried away from the public land, the d willful trespasser, is liable for the full value of the p time of commencing the suit, without any deduction fo expense bestowed thereon; but if he is an unintentiona trespasser, he is only liable for the value of the timber conversion, less the value of any such labor or expens purchaser from a willful trespasser without notice of th true ownership of the property, is only liable for the va the time of such purchase, and not for any labor or ex bestow upon it thereafter.

It is admitted that the defendant purchased this lumb ful trespasser, and is therefore liable to the United Stat the full value of the same at the time of such purchase and received the lumber at the mill, where it was wor per thousand. If he purchased without notice that belonged to the United States, he is not liable for a value he may have put on it, before the suit was broug it to Baker City; but if he had such notice he is so liab

As to the knowledge of the defendant, there is no di and the circumstances do not warrant any satisfactory in subject.

The objection that this point ought to have been ma

was not made by the district attorney, and may be considered waived. Probably he thought the defendant entitled to favorable consideration in this respect, for the candid and truthful manner in which he testified when called as a witness by the United States to make out a case against himself—which is a matter of rather rare occurrence in cases of this kind, so far as my observation goes.

Assuming, then, that the defendant was not liable for the value of the lumber at Baker City, but only at the mill, the verdict should not have been for more than five hundred dollars.

But while revising this verdict, there is another circumstance that ought to be considered. The United States was entitled to interest on the value of this lumber from the time of the conversion—in the summer or fall of 1882, until the finding of the verdict—November 27, 1885. No claim for interest was made on the trial or the court would have instructed the jury to allow the same.

But, under the circumstances, I think it nothing more than right to provide that the interest which the plaintiff was entitled to recover be deducted from the two hundred and fifty dollars, and the verdict considered as excessive only for the remainder.

Three years' interest at eight per centum per annum on five hundred dollars is one hundred and twenty dollars, which being deducted from two hundred and fifty dollars leaves a remainder of one hundred and thirty dollars.

The order of the court will be that the verdict be set aside and the cause retried, unless the plaintiff, within ten days hereof, enters a remittitur for the amount of one hundred and thirty dollars.

MEASURE OF DAMAGES IN ACTION FOR CONVERSION: See United States v. Williams, 1 West Coast Rep. 100; Murphy v. Hobbs, 5 Id. 309; Mann v. Arkansas Valley etc. Co., 6 Id. 741; Harker v. Dement, 52 Am. Dec. 670, and note 678.

SUPREME COURT OF MONTANA.

NORTHERN PACIFIC RAILROAD CO. *v.* LIL

Filed January 7, 1886.

NORTHERN PACIFIC RAILROAD COMPANY—LAND GRANT—ACT C STRUED.—The act of congress granting lands in aid of the Northern not only a law but a conveyance, and imports a present and immedia to the company of the lands described in the grant, which takes e of the date of the act, whenever the lands so conveyed are designa location of the line of the road.

THE SAME—FIXING GENERAL ROUTE OF ROAD—RESERVATION OF I act, whenever the general route of the road had been fixed, the lan were reserved from sale and held for the company, whether before or been surveyed; and thereafter no person could acquire any title thereto save by the act of the company. Such reservation was equivalent to to the company, to the extent of giving it the right to protect the s other persons. Having the exclusive right to sell the lands and to del company, to all intents and purposes, had the possession; and this, ac right to sell and to convey title, gave the company the right to prot by action of ejectment or otherwise.

EJECTMENT—AVERMENTS OF COMPLAINT.—A complaint in ejectme the seizure of the plaintiff; the possession of the defendant at the tim ment of the action, and the withholding of the possession.

APPEAL from the first district court of Custer county states the facts.

Sanders, Cullen, & Sanders, for the appellant.

Conger & Cox, for the respondent.

WADE, C. J. This is an action in the nature of ejec by the plaintiff and appellant to recover the possession from the defendant and respondent. A general demur plaint, for that it did not state a cause of action, was the plaintiff abiding its complaint, judgment was rende for the defendant.

From the complaint it appears that in the year 18 ment, by act of congress, granted certain of the publ plaintiff in aid of the construction of a railroad from to Puget's Sound; that the general route and line of th to and along the premises in controversy, which are w daries of the grant, was fixed on the twenty-first da 1872, and a map and plat thereof filed with the secret rior, in the office of the commissioner of the general that all lands included within the grant in said territ upon withdrawn from sale and pre-emption except by provided in said act; that on the nineteenth day of line of said road was by plaintiff definitely fixed near route opposite to and along said premises, and within two miles therefrom, and a plat showing the definite line of said railroad was thereafter, on the twenty-fif 1881, filed in the office of the commissioner of the gen that said road was constructed on said line along and premises on or about the fifteenth day of December, 188

and accepted by the government on the thirtieth day of September, 1882; that on the twenty-first day of February, 1872, said premises were public lands, not reserved, sold, granted, or appropriated otherwise than by said act of congress in granting certain of the public lands in aid of the construction of said railroad, and that thenceforth the said premises were reserved to and were the property of the plaintiff; and that the plaintiff, since the time of said road was so definitely fixed, has been the owner of, seised in fee, and entitled to the possession of said premises. It further appears that the defendant, on or about the first day of July, 1878, entered upon said premises and ousted and ejected the plaintiff therefrom, and ever since has withheld the possession thereof.

The only difference between the complaint and the one in the case of the Northern Pacific Railroad Co. v. Majors, 5 Mont. 111, 2 West Coast Rep. 23, is, that in the Majors case, the entry and ouster by the defendant is alleged to have taken place subsequent to the time when the line of the road was definitely fixed, and a plat thereof filed with the commissioner of the general land-office, while in the present complaint the entry and ouster is alleged to have taken place subsequent to the time when the general route of the road was fixed, and the lands withdrawn from sale and pre-emption, and prior to the time when the line of the road was definitely fixed, and a plat thereof filed with the commissioner of the general land-office.

The Majors case, and the authorities upon which it rests, conclusively determine that the act granting lands in aid of the Northern Pacific Railroad, is not only a law, but a conveyance of the highest character, and imports a present and immediate transfer of title to the company of the lands described in the grant, which takes effect by relation as of the date of the act, whenever the lands so conveyed are designated by the definite location of the line of the road. Before that time the grant is said to be afloat, but the location of the road anchors it, and causes the grant to take hold of, and attach itself to the alternate sections of land along the designated line of location, the same as if these sections were named in the act.

The lands embraced within this grant to the Northern Pacific Company consisted of alternate sections designated by odd numbers on each side of the line of the proposed road, and it was provided that whenever, prior to the time when the line of the road was definitely fixed, any of said sections, or parts of sections, should have been granted, sold, reserved, occupied by homestead settlers or pre-empted, or otherwise disposed of, other lands should be selected by said company in lieu thereof, under the direction of the secretary of the interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections. These limitations upon the grant are similar to those found in numerous other grants of land by congress in aid of railroads. Their object is obvious. The sections granted could be ascertained only when the routes were definitely located.

This might take years, the time depending somewhat upon the length of the proposed road and the difficulties of ascertaining the most favorable route. It was not for the interest of the country that in the mean time any portion of the public lands should be withheld from settlement or use, because they might, perhaps, when the route was surveyed, fall within the limits of the grant. Congress, therefore, adopted the policy of keeping the public lands open to occupation and pre-emption and appropriation to public uses, notwithstanding any grant it might make, until the lands granted were ascertained; and, provided, that if any sections settled upon or reserved were then found to fall within the limits of the grant, other land in their place should be selected. Thus settlements on the public lands were encouraged without the aid intended for the construction of the roads being thereby impaired: Railroad Co. v. Baldwin, 103 U. S. 426.

The grant to this company, however, contains a limitation upon the right to settle upon or pre-empt any of the lands included within the grant, after the general route of the road has been fixed. After that event transpires said lands are reserved from sale and held for the company, whether before or after the same have been surveyed; and if it should be held that the absolute title of the company did not attach until the definite line of location had been fixed, still, the land having been reserved from sale, except by the company, no person could thereafter acquire any title thereto or interest therein save by the act of the company.

Section 6 provides that the president of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale, or entry, or pre-emption before or after they are surveyed except by said company as provided in this act, but that the general pre-emption laws shall be, and the same are extended to all other lands on the line of the road when surveyed, except the lands granted to the company. This section is itself a grant, and a legislative reservation and withdrawal of the lands granted from sale or pre-emption except by the company.

After the general route of the road has been fixed, it provides that the odd sections "hereby granted" shall be reserved from sale or pre-emption, except by the company; that is to say, whenever the odd sections are designated by fixing the general route of the road the grant attaches and becomes certain and absolute. "And the odd sections of land hereby granted shall not be liable to sale before or after they are surveyed," except by the company. This prohibition is absolute. This land is reserved from sale by congress. It is a legislative reservation, and takes effect whenever the general route of the road is fixed; and thereafter no person could acquire any right or interest in the land reserved from sale except by act of the company, the grantee of the government.

The averments of the complaint are that after the passage of said act, the general route of the line of said road through the territory of Montana was fixed and adopted by the company on the twenty-first day of February, 1872, and a plat and map thereof filed with the secretary of the interior in the office of the commissioner of the general land-office, and that the said secretary did, therefore, on said day make an order withdrawing all the sections of land designated by odd numbers, in the said act referred to, to the amount of twenty alternate sections per mile on each side of said railroad line through said territory from sale, entry, and pre-emption, except by the plaintiff, as in the act provided.

This act of the secretary in withdrawing said sections from sale was not necessary, for congress had declared that they should not be liable to sale after the general route of the road had been fixed. This declaration by congress was a reservation of the lands, whenever the event transpired that caused it to take effect.

It must be presumed that the president, after the general route of the road had been so fixed, caused said lands to be surveyed, as provided for in section 6 of said act, but whether he did or not, the lands were reserved from sale, except by the company, both before and after they had been surveyed, and this reservation took place by operation of law and as in said act provided.

This reservation of said lands from sale and pre-emption, except by the company, protected the lands for the company, and would so continue to protect them until the order making said reservation had been revoked and said act repealed. Such a reservation made by operation of law was equivalent to a sale of the lands to the company to the extent of giving to the company the right to protect the same as against all other persons. Having the exclusive right to sell the lands and to deliver possession thereof to the purchaser, the company, to all intents and purposes, had the possession, and this, accompanied with the right to sell and to convey title, gave the company the right to protect their possession by action in ejectment or otherwise, against every and all other persons. The reservation of said lands from sale and pre-emption, except by the company by operation and in pursuance of law, was the consummation of the grant to the company, and the title so conveyed related back to the date of the grant, and was equivalent to a title in fee. After such reservation in behalf of and for the benefit of the company, consequent upon the general route of the road having been fixed, the grant was no longer afloat, but it attached itself to and took hold of the designated sections as if they had been named in the act.

All that the act and all that the decisions require, in order to consummate the grant, is that the alternate sections be designated. Fixing the line of the general route of the road does cause the alternate sections along said line to be designated, and to be reserved from sale and pre-emption, except by the company; and fixing the line of definite location, if the same is along the line of the general route, as in this

case, does not add anything to the efficacy of the grant. That only does what has already been done before, by operation of law, whenever the general route of the road has been fixed.

The defendant entered upon the premises in question, which are situate within the boundaries of the grant to plaintiff, and within two miles from the line of the general route and definite location of the road in 1878. At that time the line of the general route of the road had been established, and the alternate sections, in consequence thereof, and by operation of law, had been withdrawn from sale and pre-emption except by the plaintiff. It was not possible, therefore, at that time, for the defendant to have acquired any interest in or title to said premises, which were a part of one of the alternate sections aforesaid, save from the plaintiff who owned and held the title thereto. The government could convey no title or right, for the reason that the premises had been previously reserved and withdrawn from sale and pre-emption for the benefit of the plaintiff who held the exclusive right to sell and dispose of the same. The defendant, therefore, when she entered upon said premises and ousted the plaintiff, was a mere trespasser, without color of right or authority; and she claims no rights by adverse possession. Under our decisions a complaint in ejectment is good, if it aver the seizure of the plaintiff, the possession of the defendant at the time of the commencement of the action, and the withholding of the possession: McComley v. Gilmer, 2 Mont. 202; Herbert v. King, 1 Id. 475. This complaint contains these necessary averments, and the demurrer thereto ought to have been overruled.

Judgment reversed, and remanded.

EJECTMENT, PLEADINGS AND ALLEGATIONS IN: See Allen v. Holt Bros., 6 West Coast Rep. 776; Hildreth v. White, Id. 130; Osborne v. United States, 5 Id. 243; Rego v. Van Pelt, 2 Id. 903.

SUPREME COURT OF NEW MEXICO.

GONZALES *v.* ATCHISON, TOPEKA, AND SANTA FÉ R. R. CO.

Filed January 11, 1886.

APPEAL—PROPOSED RECORD MUST CONTAIN PLEADINGS.—An appeal will be dismissed if the appellant fails to serve on the attorney of the appellee a copy of the proposed record containing the pleadings and proceedings in the case.

MOTION to dismiss appeal. The opinion states the facts.

Francis Downs, for the appellant.

Henry L. Waldo, for the appellee.

HENDERSON, A. J. On the second day of the term appellee filed a motion to strike from the files of this court the record filed in the cause. The motion is in the following form, to wit:

"In the Supreme Court, Territory of New Mexico. January Term, 1886. Nasario Gonzales, Appellant, v. Atchison, Topeka, and Santa Fé Railroad Company, Appellee.

"Now comes the said appellee by its attorney, Henry L. Waldo, esq., and moves the court to strike from the files of this court the pretended record on file in this cause for the reasons set forth in the affidavits accompanying this motion, and as shown by the certificate of the clerk of the district court attached to said pretended record: That appellant has failed to comply with the provisions of rule twenty-four (24) of the rules of this court as to the preparation of records for review in this court. HENRY L. WALDO, Attorney for Appellee."

Two affidavits accompanying this motion were filed, in which the failure on the part of appellant to comply with the rule referred to, is specifically pointed out. The first is that of Henry L. Waldo, esq., in substance as follows: That at the time of bringing this suit he was, and thence hitherto has been, and now is, the attorney of the said Atchison, Topeka, and Santa Fé Railroad Company and the designated agent, residing at Santa Fé, territory of New Mexico, of said company, upon whom process might be served, and the attorney of record in said cause; that no proposed record of the pleadings and proceedings containing a proposed bill of exceptions was ever served upon him as the attorney of record in said cause, nor as the designated agent of said company, nor was any proposed record of any kind or in any form ever submitted to him as such attorney or designated agent, and that he has never had any notice or knowledge of such a record having been proposed or offered for settlement to the presiding judge of the first judicial district court of said territory of New Mexico, nor to either of the judges of the second or third judicial district courts of said territory, acting for said judge of said first judicial district court. The remaining portion of the affidavit refers to certain correspondence contained in the transcript of the record in this cause.

The other affidavit is that of Summers Burkhart. He states that he is now, and was during the entire year of 1885, chief deputy of the

clerk of the first judicial district court of this territory, and as such is, and was during that time, familiar with the files and records of said clerk's office; that he made the copies of the papers, record entries of proceedings in the case of Nasario Gonzales v. Atchison, Topeka, and Santa Fé Railroad Company, lately pending in the first judicial district court of said territory, now on file in the office of the clerk of this court, and attached the certificate of the clerk thereto as deputy; that no proposed record or prepared or made record in said cause, settled or not settled by the district judge, has ever been filed or tendered to be filed in said cause, and that the transcript made by him as such deputy as aforesaid was not made from any proposed record or prepared or made record filed in said cause under rule 24 of the rules of the supreme court; that the only paper filed or tendered to be filed in said cause since the determination of said cause in the first judicial district court, by the appellant or his attorney, was the paper mentioned in the said certificate as the paper filed and indorsed "bill of exceptions," together with certain letters and affidavits accompanying the same.

So much of rule 24 as may be necessary for the consideration of the proposition presented by the motion is as follows, to wit:

Whenever it shall be intended to review by appeal or writ of error a judgment of the district court, a record of the pleadings and proceedings in the case, containing a proposed bill of exceptions, if the appellant desire to present exceptions not appearing on the record, shall be prepared by the appellant, and a copy thereof served on the opposite party or his attorney within ten days after the entry of judgment, unless the time is extended by the court; and the party served may, within ten days after such service, propose amendments to the proposed record and exceptions, and serve a copy of such amendments on the appellant, who may then, within five days thereafter, serve the appellee with a notice that the proposed record and exceptions, with the proposed amendments, will be submitted at a time and place to be specified in the notice, to the district judge before whom judgment was obtained, for settlement. The said judge shall thereupon correct and settle the proposed exceptions, and determine what portion of the record of proceedings in the case shall be transmitted to the supreme court. The time for such settlement to be specified in said notice shall not be less than ten nor more than twenty days after service of such notice.

2. If the appellant shall omit to make a proposed record with exceptions, if exceptions are to be presented, within the time limited by law or as extended by the court, *he shall be deemed to have waived his right thereto.*

Counsel for appellant does not question the power of this court to make and enforce the rule in question, but insists that a fair and liberal interpretation of it, when considered by the light of the facts presented in the record, will not compel or even authorize this court to strike the record from the files. The power to make the rule being conceded, and it appearing to be free from uncertainty or ambiguity, nothing is left for construction by the court.

The only question presented is, Was there a substantial if not a literal compliance with the provisions of this rule? We think not. No proposed record containing the pleadings and proceedings, or any part thereof, in the cause accompanied the bill of exceptions tendered counsel for appellee, nor was such record, or any part thereof, within the meaning of said rule, presented with the bill of exceptions to the judge when offered for settlement.

The letter addressed by counsel for appellee to that of appellant, on returning the proposed bill of exceptions, cannot be construed as a waiver of the right to be served with a copy of "the record of the pleadings and proceedings in the case." Nor can his acts be construed as consenting that the bill of exceptions containing a reference to some of the pleadings may be considered as a proposed record as well as the exceptions contained in the tendered bill. The rule is of doubtful utility, and imposes needless costs in perfecting appeals; but it is in force, and must be observed in this case. The motion will be sustained, and the record stricken from the files, and it is so ordered.

LONG, C. J., and BRINKER, A. J., concurred.

IN THE MATTER OF CLAIM FOR RECOGNITION AS ATTORNEY-GENERAL.

Filed January 11, 1886.

ATTORNEY-GENERAL — VACANCY IN OFFICE — APPOINTMENT BY GOVERNOR. — The governor of the territory, having power to appoint an attorney-general, during a recess of the legislative council, only in case of a vacancy caused by death or resignation, the supreme court will not presume, in support of an appointment so made, that either of such contingencies have happened, when the person who is claimed to have vacated the office is present in court, and has continuously exercised the functions of his office to the knowledge of the court.

Warren, for the claimant Laughlin.

Bell and John H. Knaebel, for the claimant Breeden.

LONG, C. J. Colonel William Breeden and Hon. N. B. Laughlin are before this court, each claiming that he is the attorney-general of the territory of New Mexico, and entitled to recognition as such, and to exercise the functions of that office. The duty is therefore upon the court to determine who shall be recognized. On the fourth day of the term, cause No. 175, Territory of New Mexico v. John Kinney, was called, whereupon Mr. Breeden, assuming to be attorney-general, as such appeared therein for the territory, and was proceeding to take action when he was interrupted by Mr. Laughlin, who addressed the court, claiming to be the attorney-general both *de jure* and *de facto*, and presented in support of such claim a commission, in all particulars regular upon its face, signed by Edmund G. Ross, governor of the territory of New Mexico, properly sealed and attested, bearing date November 15, 1885, together with the oath of office thereon. Under this commission and

oath of office Mr. Laughlin asked to be recognized by the court as attorney-general, and to be allowed to appear as such to the exclusion of Mr. Breeden, who then presented to the court a commission in all particulars regular and formal, signed Lionel A. Sheldon, governor of New Mexico, duly sealed and attested, together with the oath of office, and demanded the right to proceed as attorney-general. His commission bore the date April, A. D. 1884. By permission Judge Warren addressed the court on behalf of Mr. Laughlin, and Judge Bell and Mr. Knaebel for Mr. Breeden. In this way the question is before the court, Who shall be recognized as attorney-general *de facto?* It is not a proceeding in *quo warranto*, or a voluntary appearance by parties under a stipulation, or an issue legally joined in a court with jurisdiction to render a judgment binding on the parties after a judicial examination of the evidence. The contestants have not come here in any way to submit to the jurisdiction of the court and ask judgment on the merits of their respective claims. The question is here, under these circumstances, rather in the nature of an inquiry by the court to determine who is the *de facto* officer. In the proper exercise of its functions in the transaction of public business the court must in this informal manner determine who is the attorney-general in fact, for the time being, upon such facts as are before it on the face of the respective commissions and with those of which the court may take judicial notice. We shall not determine who is the officer *de jure* holding legal title. To procure a determination of that matter an issue binding on the parties must be made. It is contended in behalf of Mr. Laughlin that inasmuch as he holds the commission latest in date the court should presume in favor of his claim; the commission lawfully issued, that the presumption of law is the officer executing it did so only within his legal powers. This may be true as a general rule, but it is equally true that the court in acting of its own motion to ascertain who are its officers must also know as matters of law not only the extent, but also the legal limit of executive power, as declared by its own decided cases. The court must take notice of its own decisions, and where in its adjudications the power of the executive has been defined and declared, the court will not presume, against its own rule, the existence of wider authority.

In the case of "the territory of New Mexico v. Stokes and Mullen," 2 N. M. 63, the power of the governor to appoint an attorney-general during a recess of the territorial council, was carefully considered by this court upon full argument. It was there clearly held that when a vacancy in the office of attorney-general occurred "by death or resignation during the recess of the legislative council" the governor might appoint to fill such vacancy, but not to fill one occurring in any other way. Under the facts reported in that case, it was held the office of attorney-general was vacant otherwise than by the death or resignation of the incumbent, and the governor wholly without legal power to fill the same, and so, for want of this legal right, the office continued for some time vacant. That decision stands as the declared law, and we are bound to respect it until overruled or modified in a regular pro-

ceeding. This court would not be in the rightful exercise of power, under the circumstances here, with neither cause, parties, nor issues before it, in attempting to modify or reconsider its own adjudication regularly made. That cause stands, not as the opinions of the judges upon the bench, but as the solemn adjudication of the highest judicial tribunal of the territory, binding upon this court, and must be to us in this informal consideration the measure of the governor's power to appoint. The inquiry then must be, Was Mr. Laughlin appointed to fill a vacancy in the office of attorney-general arising by death or resignation? It is conceded Mr. Breeden's term had not expired by limitation. We are asked to presume that at the date of Mr. Laughlin's commission Mr. Breeden was either dead, or had resigned, in order to give effect to the act of a co-ordinate branch of the government. Is there any unyielding rule of law calling upon the court to ignore every other fact and act upon such a presumption? If so, it is the duty of this tribunal to follow the rule. While it is the duty of each department, as far as can legally be done, to give to every other due consideration, respect, and credit, yet, in applying this principle, each particular case must, subject to legal rules, stand upon its own facts. The presumption sought to be maintained here may be rebutted and overcome. With Colonel Breeden in the very presence of the court, transacting business there in person, could the court presume him dead? Certainly not.

Suppose, to illustrate, court had been for a month at the date of Mr. Laughlin's commission in session, and during every day of that time Mr. Breeden had in person appeared therein as attorney-general, exhibiting his commission, and acting thereunder in prosecution of causes, thus bringing openly to the knowledge of the court his continuous claim to the office, and while so engaged a commission as attorney-general were presented from the executive department, with claim to the office, would any court under such conditions presume resignation, and thus exclude the possessor from his place? We believe not. In this inquiry, however it might be upon a regular issue, the court is not bound by any strict rule compelling the adoption of a technical presumption, excluding a consideration of important facts of such prominent, open, and notorious public character as to be matter of general public history, and thereby within the judicial knowledge of the court. The court should also take cognizance of its own records and proceedings, with the daily personal appearance of the attorney-general before it, in the discharge, in fact, of official duty. Such records carry to the court, without other proof, knowledge that Mr. Breeden has continuously appeared herein as attorney-general, and there performed the duties of his office. These facts, thus before us, with his appearance in the open discharge of official duties continuously in the various courts of the territory, in the most public manner, receiving therein official recognition by the judges of this court, and allowance therefrom for services as attorney-general, both before and after the date of Mr. Laughlin's commission, the continuous assertion in the most vigorous and public manner in the courts and through the

public press of his intention and right to hold unde with his appearance here in causes of the territory as are matters which the court may legally know withou of judicial knowledge, and constitute such an actua possession of office under claim of right as to rebut th resignation. We cannot legally turn away from the an officer so openly and notoriously in possession of the very presence of the court, to be informally exclu tion, without trial of his legal right, upon the mer such circumstances, of a contestant. Other facts are the judicial knowledge of the court. The executiv and public announcement, through the press and by c tion, of his right to remove Mr. Breeden, of the fact statement of the alleged cause, thereby making this e conspicuous part of the current public history of the ther, the executive department of the territorial gov officially to the notice of a majority of the judges formal written communication, the fact that Mr. Bre governor removed from the office of attorney-general was done, no doubt, to place before the judicial depart ritory, in a formal way, knowledge upon which it sh official action of a co-ordinate branch of the territo Shall the court presume such communication was fo pose, or, treating the executive department with th which it is entitled, give the communication to this dignity and force it deserves, as official information assertion by the executive of the right of removal latter. Thus the presumption upon which Mr. Laugh come here by the considerations stated.

This court must consider and give effect to its ov appearance in office in the actual discharge of duty in officer, to the public proclamation of the executive, t and notorious public facts of current history in the executive communications to the courts, rather than them all, to thereby exclude a public officer from plac session and discharging official duty. We pass upon executive power or legal right, except on this informal sume the law on that subject to be, as declared by the tribunal of the territory, until overruled or modified court. If the judgment of this tribunal is to be in correctness of that decision, it must be upon a cause proper parties and issues. Authority is not cited in ruling, as it is believed the principles upon which it is r settled and universally recognized as to commend the citation.

The court will recognize Mr. Breeden as the *de facto* eral. In this ruling, as to all its parts, each member of concurs.

BRINKER, A. J., and HENDERSON, A. J., concurred.

TEXAS, SANTA FÉ, AND NORTHERN RAILROAD CO. *v.* ORMAN ET AL.

Filed January 12, 1886.

MECHANIC'S LIEN—ACTION TO FORECLOSE—FINAL DECREE.—In an action to foreclose a mechanic's lien, the court gave judgment for the complainants, and decreed that the property affected by the lien be sold and the proceeds applied to the payment of the complainant's demand, and the balance paid into court. Subsequently, the court ordered that the decree be modified by requiring the entire proceeds to be paid into court to await the determination of the rights of priority of other lienors, and that such decree be vacated so far as it conflicted with such order. *Held*, that such prior decree was final, and that the supplemental order did not affect its finality.

ERROR to the district court of Santa Fé county. The opinion states the facts.

Gildersleeve & Preston, and Catron, Thornton, & Clancy, for the plaintiff in error.

H. L. Waldo, William Breeden, and John M. Knaebel, for the defendants in error.

BRINKER, A. J. This is a motion to quash the writ of error. There are various grounds set up in the motion. In our opinion it is only necessary to consider the fifth, which is as follows: "For that the said writ of error does not bring up for review in this court a final decree or determination of the district court." If this ground is sustained, the writ must be quashed. But if it is not sustained by the record the motion must be denied. The record discloses the following facts: On the tenth day of November, 1883, complainants filed a bill in chancery in the district court of Santa Fé county against the Texas, Santa Fé and Northern Railroad Company to enforce a mechanic's lien for work and labor performed and materials furnished the railroad company in the construction and grading of the road-bed of the railroad company upon that part of its line known as the San Juan division.

Such proceedings were had in the cause thereafter, that on the thirteenth day of June, 1884, a decree was rendered in which the court finds: That complainants performed the work and labor and furnished the materials for which a lien was claimed; that a notice of lien was filed in the proper office as required by law, the amount remaining due and unpaid; declared that amount to be a lien upon the San Juan division of the road-bed, including bridges, grading, culverts, ties, timber, and other material pertaining to said road-bed; ordered and decreed that said lien be enforced by a sale of the premises; appointed a master to make the sale, directed the advertisement, manner, and terms of sale, and ordered the master to distribute the proceeds of the sale, after paying the cost and charges of making the sale, and a master's fee of five hundred dollars, as follows: To complainant's solicitors, three thousand dollars; to the complainants in satisfaction of their lien twenty-nine thousand six hundred and fifty-seven dollars and fourteen cents; the residue to be paid into the registry of the court.

On the fifth day of July, 1884, the master advertised that he would on August 21, 1884, at the court-house door in Santa Fé sell the prop-

erty covered by the lien in the manner and upon the te
the decree.

The record also shows that Adam J. Hager, Lionel I
and Samuel L. Bachelder had each filed bills to enfor
said railroad.

It further appears that on August 2, 1884, the co
Hager, Saxton et al., and Bachelder entered into and fi
a stipulation in which they agreed that the purpose of
proceedings in said four causes should be consolidated.
be entered in said causes so consolidating, modifying th
tofore entered in said causes, and each of them, so that
said property should be made. That such sale be mad
Orman & Crook, by the master appointed in that case,
in the decree rendered therein, and upon the notice an
already made by said master. That the master instea
the proceeds of the sale as directed in that decree shoul
into court to abide the further order of the court.
should, upon the bringing in of said money, determine
the several liens and distribute the funds accordingly.

On the same day the court made and entered of rec
decree in said four causes upon the stipulation of tl
plainants, in which it recites the decrees in said ca
"that for the purposes hereinafter set forth, said four . .
be and are . . . . united and consolidated, and the sam
and be heard and determined together, and the said re
heretofore rendered in said causes are hereby modified
all respects conflicting herewith." It then proceeds to
erty sold for the purpose of paying the demands of the
plainants; that the sale ordered and advertised in the C
case proceed in the manner and upon the terms so
decree in that case; that the master appointed in th
the sale as therein directed, but instead of paying out
ordered in the Orman & Crook case, that he bring it i
upon the bringing in of the money the respective compl
have permission to apply to the court for participation
tion of the money, and that the court should determin
priority of the respective liens as between the severa
that on such hearing and determination nothing in any
should prevent the investigation of any and all facts
correct finding and determination of the priority of th
between the respective complainants, and for that p
testimony might be introduced by either or all of the c

The railroad company was not a party to the stipula
not to have been consulted as to the disposition of the
sale of its property. It was, however, in court when th
solidated decree of August 2d was rendered.

How the stipulation and consolidated order happen
record, we are unable to say. They are not properly b

case. The writ of error was not issued to bring up the records in the consolidated causes for review, and we can only consider it in the light of a supplemental order, or direction appended to the June decree, unless its effect is to vacate that decree in some essential particular. The June decree was rendered in vacation, but it was conceded on the argument that it was final in form and substance down to August 2d, when, it is claimed, it was vacated by the consolidated order of that date.

That it was a final decree, prior to the entering of the consolidated order, we think there can be no doubt, independent of this concession. The parties to the cause in which it was rendered were Orman & Crook, complainants, and the railroad company, respondent. The finding was, that complainants had performed the labor and furnished the materials for which they claimed a lien, the amount due upon the lien; that they had complied with the law regulating the filing of notice; that they were entitled to a lien for the amount of their demand; the description of the property effected by the lien, and ordered that the lien be enforced against that specific property; that the property be sold to satisfy the lien; that a master be appointed to make the sale; directed the terms and manner of sale, the advertisement, the distribution of the money. This, then, was in all essentials a final decree: Bostwick v. Brinkerhoff, 106 U. S. 3; Stovall v. Banks, 10 Wall. 583.

It is insisted, with much force and ability, that the consolidated order of August 2d vacated the June decree, and thus destroyed its finality, so that a writ of error would not lie to bring it here for review. An examination and analysis of that part of the order of August 2d which refers to the June decree shows that this contention cannot be sustained.

That order only purports to vacate so much of the June decree as "conflicts" with the order of August. The only conflict between that order and the June decree is, that the June decree directs the master to advertise and sell the property in a specified manner, upon a designated notice, and distribute the proceeds, while the August order directs the same master to sell the property in the same manner, under the identical advertisement, begun under the June decree, and not then expired, and pay the proceeds into court, when the court would determine the rank and priority of the several liens, not between the complainants and the railroad company, but between the several complainants. The rights of the railroad company had been finally adjudicated, and any further proceedings in the district court, under either of the decrees, would not affect it.

From the terms of this August order, it seems that the liability of the railroad company had been theretofore settled, and what remained to be done was simply to divide the proceeds of sale among the complainants contending for priority, in which the railroad company could have no interest.

In our opinion the August order was at most a supplemental or decretal order requiring the proceeds arising from the sale under the June decree to be paid into court for distribution. It does not in any

respect vacate the substance of the June decree, or destory its finality. It has no greater effect, either in its letter or spirit, than if it had been appended to the June decree by way of directions as to the distribution of the money arising from the sale.

In Stovall v. Banks, *supra*, the supreme court of the United States say: "It is not unusual in courts of equity to enter decrees determining the rights of the parties, and the extent of the liability of one party to the other, giving at the same time a right to apply to the court for modifications and directions. It has never been doubted that such decrees are final."

In Mills v. Hoag, 7 Paige, 19, the court say: "A decree is not the less final in its nature because some future orders may possibly become necessary to carry such decree into effect." This case is quoted with approval by the court in Stovall v. Banks.

The case of Tompkins v. Hyatt, 19 N. Y. 534, is not in point. In that case, after rendering a decree in favor of plaintiff for the amount of his demand, and the enforcement of his lien, a reference is made to a master to ascertain the amount of the indebtedness of plaintiff to defendant, and to deduct such indebtedness from the sum ordered to be paid plaintiff, clearly recognizing the fact that defendant had a further interest in the controversy which was still undetermined. No such fact appears in this case. The questions in which the railroad company was interested had been finally adjudged against it.

A number of authorities have been cited to show that the court had complete control over its decrees during the term, and that it could modify or vacate them at any time during the term. This principle is so well settled that we have deemed it unnecessary to review the authorities sustaining it.

We are unable to agree with counsel that the court did in fact vacate the June decree by its order of August 2, 1884.

It follows, therefore, that the motion must be denied. And it is so ordered.

LONG, C. J., and HENDERSON, A. J., concurred.

FINAL JUDGMENTS, WHAT ARE: See Mills v. Hoag, 31 Am. Dec. 272; Scott v. Burton, 55 Id. 782; Teaff v. Hewitt, 59 Id. 634, and note 657; and Williams v. Field, 60 Id. 426, and note discussing this subject at length.

SUPREME COURT OF OREGON.

ANDRUS *v.* KNOTT ET AL.

Filed November 17, 1885.

TIDE-LANDS DEFINED.—Tide-lands are lands lying between ordinary high-water and low-water mark, and which are alternately covered and left dry by the ordinary flux and reflux of the tides. Lands which are covered with water three fourths of the year cannot be considered as such.

APPEAL from the circuit court. The opinion states the facts.

E. B. Watson and *S. W. Condon*, for the appellant, W. H. Andrus.

H. F. Bingham and *Benton Killin*, for the respondents, Levi Knott and another.

LORD, J. The action was in ejectment. It was brought to recover certain lands claimed to be tide-lands. The court below held that the land in controversy was not such land. It is clear, unless the land in dispute is tide-land, or comes within the description of such lands, it is necessary to consider the other legal propositions which counsel have discussed, as applied to such lands. What is meant by the phrase "tide-lands"? In Rondell v. Fay, 32 Cal. 354, it was held that the descriptive phrase "tide-lands," in the legislation of that state, applies to land covered and uncovered by the ordinary tides, which the state owns by virtue of its sovereignty: People v. Davidson, 30 Cal. 380; Walker v. Marks, 2 Saw. 152. It would seem to correspond to or be synonymous with "shore" or "tract," and this, at common law, is that land which lies between ordinary high-water mark and low-water mark: Hale, De Jur. 12; Hall, Sea; Blundell v. Catterall, 5 Barn. & Ald. 292. It must, then, be such land as is affected by the tide, that lies between ordinary high-water mark and low-water mark, and which is alternately covered and left dry by the ordinary flux and reflux of the tides. Lands adjacent to navigable waters, where the tide flows and reflows, which at high tides are submerged and at low tides are bare, come within such description: Bell v. Gough, 23 N. J. L. 683. It can hardly be considered as including any ground that does not come within the provision of this description.

It is needless to say that lands covered with water three fourths of the year cannot be considered as such.

The judgment must be affirmed.

SCHNIDER *v.* WHITE.

Filed November 17, 1885.

PROMISE IN FAVOR OF THIRD PERSON—ACTION MAY BE MAINTAINED ON.—One in whose favor a promise is made, upon a consideration moving from another, may maintain an action thereon, although he was not informed thereof until afterwards.

APPEAL from the circuit court. The opinion states the facts.

A. Lenhart, for the appellants, S. S. White and othe
Frank V. Drake, for the respondent, H. Schnider.

THAYER, J. The only question in this case which t of sufficient importance to be noticed is, whether the co justice's court contained a cause of action. The follow the said complaint:

"Plaintiff, for cause of action against defendant, alle the year 1884 James Dickson, at the special instance defendant, rented to defendant one store for the perio which rent was of the reasonable value of ten dollars, defendant promised and agreed to pay to plaintiff the r thereof, and that the reasonable value thereof was and and that no part thereof has been paid, although dema Dickson assigned to plaintiff said claim on December 8, there is now due and owing from defendant to plaintiff ten dollars, over and above all legal claims and set-offs."

The only objection urged against the complaint was t ant promised and agreed to pay the plaintiff the rent, in ing to pay it to Dickson. I have no doubt that the pl to allege that the defendant promised and agreed to p Dickson. That would have been more natural. Hav premises of the latter he would have been more likely ised to pay him the rent. But taking the complaint a I think, beyond doubt, it contained a cause of action. for a valuable consideration moving from Dickson, prom plaintiff a sum of money, and the latter can enforce it. can be maintained by A upon a promise made by B up tion moving from C to pay A a sum of money, even thc informed thereof until afterwards, is too well settled to re to support the proposition.

The judgment of the circuit court will therefore be re cause remanded to that court, with directions to dism review.

WHEN THIRD PERSON MAY SUE ON PROMISE FOR HIS BENEFI Whitney, 35 Am. Dec. 621; Burrows v. Turner, Id. 624; Barker v. F note 739.

NORMANDIN v. GRATTON.

Filed November 19, 1885.

EVIDENCE—SETTLEMENT OF ACCOUNTS.—A settlement between t *facie* to be taken as a settlement of all demands, but is not conclusiv a recovery for matters not included in the settlement, though existi evidence to show the exclusion of such matters is admissible.

APPEAL from the circuit court. The opinion states t

X. N. Steeves, for the appellant, E. Gratton.

Alfred N. Sears, jun., and *Henry E. McGinn*, for the respondent, Octave Normandin.

LORD, J. The question asked and answered by the witness was evidence tending to rebut the presumption of the settlement alleged, including all demands between the parties, and was admissible. It is conceded that a settlement between the parties is *prima facie* to be taken as a settlement of all demands, but is not conclusive, and is no bar to a recovery for matters not included in the settlement, though existing at the time: Nichols v. Scott, 12 Vt. 47; Ryan v. Rand, 26 N. H. 15. The object of the question was to show that the matter referred to was not included in the account stated, and thus rebut the presumption that it included all previous transactions: Whart. Ev., sec. 1133, and notes. As such the question was admissible, and the objection was properly overruled.

It is true the answer might have been more explicit, and specified the transactions with more particularity; but in failing to develop this, the plaintiff ran the risk of this evidence proving unsatisfactory for the purpose offered. And yet if it was unsatisfactory to the adverse party, he had the opportunity of cross-examination, and could have compelled a further explanation. As it was, the parties were content to submit the matter to the tribunal whose province it was to adjudge the fact, and as this resulted adversely to the appellant, it is not perceived how he can remedy it. To impeach an account stated, either fraud or mistake must be shown to exist; but that is not the question involved in this case. In respect to the note it is sufficient to say that the same principle already discussed is applicable to it. Upon this record we cannot do otherwise than affirm the judgment.

SUPREME COURT OF UTAH.

IN RE MACKNIGHT.

Filed January 15, 1886.

REHEARING, WHEN GRANTED.—To justify a rehearing the court mu it has failed to consider some material point in the case, or that it ha clusions, or that some matter has been discovered which was unknow argued.

PETITION for a rehearing in a proceeding to disbar an

J. R. McBride, for the petitioner.

POWERS, J. The respondent petitions for a rehearin is set forth in the petition that was not before the court was decided. The reasons urged are that this court er clusions. We are not convinced that such is the case. times held that to justify a rehearing a strong case We must be convinced either that the court failed to material point in the case, or that it erred in its concl some matter has been discovered which was unknown was argued: Venard v. Old Hickory M. & S. Co. et al. Rep. 847.

The application must be denied.

ZANE, C. J., and BOREMAN, A. J., concurred.

FERRY v. STREET.

Filed January 15, 1886.

REHEARING GRANTED.

PETITION for a rehearing.

P. Denny, for the appellant.

Arthur Brown, and *Sutherland & McBride*, for the r

POWERS, J. The appellant petitions for a rehearing. heard by this court before two of its present members bench. The opinion was not filed until some months a of the present members of the court had retired from t questions involved are of importance, and we are persua is made by the petition which will justify us in orderi The case, as now presented, is quite similar to the case Guest, 6 West Coast Rep. 849, decided at the June term a rehearing was granted.

We feel that we must not overlook the fact that th guage of the petition filed in this case is reprehensible are cast upon the predecessors of the present membe which we cannot allow to pass unrebuked. We hav

heretofore to discuss among ourselves papers which were not couched in language proper to be addressed to a court of last resort, and we have determined that we cannot longer permit counsel to file papers disrespectful to the court, or to former members thereof, or which, overstepping proper bounds, attack reputable members of the bar. If we did not feel that a party should not suffer from the indiscretion of his counsel, we should refuse a rehearing upon the petition filed. But looking simply to the merits of the matter, and not to the manner in which it is presented, we order a rehearing.

ZANE, C. J., concurred.

BOREMAN, J., having been counsel in the case, did not sit.

WENNER *v.* SMITH

Filed January 15, 1886.

PROBATE JUDGE—VACANCY IN OFFICE—APPOINTMENT BY GOVERNOR.—Under the act of congress of August 7, 1882, the governor had authority to fill a vacancy in the office of probate judge caused by a failure to elect such officer at the time appointed for the general election.

STATUTE, HOW CONSTRUED.—When the words of a statute are not explicit the intention is to be collected from the context, from the occasion and necessity for the law, from the mischief felt, and the object and remedy in view.

CONGRESS HAS SUPREME CONTROL OF ALL THE TERRITORIES, and laws enacted by it for their government are supreme, any law of a territory to the contrary notwithstanding.

TITLE TO OFFICE—ACTION TO RECOVER FEES.—Title to an office may be determined in an action by the claimant thereof, for money had and received, to recover the fees from a wrongful intruder. In such action the measure of damages is the amount of fees collected by the intruder.

ALL OBJECTION TO THE MISJOINDER OF CAUSES OF ACTION, unless taken advantage of by demurrer, is waived.

APPEAL from the third district court. The opinion states the facts.

Bennett, Harkness, & Kirkpatrick, for the appellant.

Thomas Maloney, for the respondent.

POWERS, J. This case comes to us on appeal from the third district court. It appears by the findings of fact, that the plaintiff Uriah J. Wenner was in August, 1884, and had been for three years prior thereto, a citizen of the United States and a resident and tax-payer of the city and county of Salt Lake, in Utah territory. It also appears that there was no election in the territory of Utah in August, 1882, as provided by the statute, for the reason that all the election offices of the territory had been vacated by the act of congress, approved March 22, 1882, entitled "An act to amend section 5352 of the revised statutes of the United States, in reference to bigamy, and for other purposes," and the fact that the commissioners appointed under section 9 of the act did not arrive in Utah in time to fill the offices and provide for the election. In consequence, therefore, of the provisions of the act, there was no election of county officers held in Utah in 1882.

No question is made but what in August, 1880, th
sessed all the qualifications required by the statutes o
for holding the office of probate judge of Salt Lake co
general election held in August, 1880, he was elected
and on the twenty-fourth day of the same month he w
by the governor of the territory as such officer, entere
charge of the duties of the office, and held it continuou
1, 1884.

From some time prior to 1862 the defendant has be
the Mormon church, and has believed that polygamy
to him. He was married to two women previous to
then to the present time he has treated the women as
not entered into new or other marital relations since 18

September 16, 1882, the governor of the territory of
H. Murray, deeming that there was a vacancy in the o
judge of the county of Salt Lake, under the provision
congress referred to, and a provision of a subsequent
approved August 7, 1882, the same being a provision con
ter 433 of the laws of the first session of the forty-se
appointed the plaintiff to the office. The plaintiff the
the eighteenth day of September, with two good and suf
to wit, William G. Green and Adam S. Patterson, exec
bond conditioned for the faithful performance of his of
probate judge, in the penal sum of five thousand dollars
were residents of the county of Salt Lake, and each wo
five thousand dollars over and above his debts and liab
erty not exempt from execution. On the same day tha
executed the plaintiff took an oath to the effect that he
and faithfully perform the duties of the office of judge of
oath was then and there attached to the bond.

James Cummings was then the treasurer of Salt La
on the eighteenth day of September the plaintiff tende
office, the bond with the oath attached and requested
file the same. Cummings then and there unqualifie
approve, or file, or accept the bond and oath, assigning
son for such refusal that he did not recognize the appo
plaintiff to the office. Thereupon the plaintiff deposite
oath with the secretary of the territory, for the use
whomsoever it might concern, as being the best substi
for the filing required with the county treasurer. O
second day of September, 1882, the governor of the
to the plaintiff a commission for the office of probat
form and under the seal of the territory, duly atteste
tary. On the same day the plaintiff exhibited his co
defendant, informed defendant of his appointment a
to and for said office, and demanded of defendant th
to him the office of probate judge, and deliver to him

papers pertaining to the office—all and singular thereof, and the defendant refused.

The plaintiff, in accordance with the provisions of the statute, was appointed for the term of eight months. The fees and emoluments of the office of probate judge, received by the defendant during the term of eight months next ensuing September 22, 1882, amounted to the sum of one thousand four hundred dollars. For these fees and emoluments so received, the plaintiff made demand of the defendant before bringing suit, but payment was refused. The defendant held the office during the said term of eight months, believing that he had a right thereto, and the fees and compensation received by the defendant were not more than the reasonable worth of the official services performed.

Upon this state of facts, the learned judge who tried the case in the court below found as conclusions of law:

1. A vacancy existed in the office of probate judge of Salt Lake county on the sixteenth day of September, 1882, which the governor of Utah territory was by act of congress authorized to fill by appointment.

2. By the appointment of the governor, by the efforts made to qualify, and by the commission of the governor, plaintiff became and was on the twenty-second day of September, 1882, entitled to enter into and hold said office of probate judge, and have and keep the fees and emoluments thereof for the term of eight months next ensuing.

3. Plaintiff is entitled to judgment against defendant for the sum of one thousand four hundred dollars, and interest thereon, at ten per cent per annum, from August 28, 1884, amounting, principal and interest, to one thousand five hundred and sixty-three dollars and thirty-three cents, and for costs of suit.

There are three questions raised by the record: 1. Was there a vacancy in the office of probate judge which the governor was authorized to fill? 2. Can the plaintiff recover without first vindicating his title to the office in a direct proceeding? 3. What is the measure of damages if the plaintiff was entitled to judgment?

1. We think that the first question must be answered in the affirmative. We think that on the day that the appointment was made that a vacancy existed in the office which the governor was authorized to fill, and that he performed his plain duty in the premises. It had been provided in substance by section 8, chapter 47, of the first session of the forty-seventh congress, that no bigamist, polygamist, or person cohabiting with more than one woman, should be eligible to or entitled to hold any office. Congress also enacted, as will be seen by reference to page 313 of the laws of the same session, that "the governor of the territory of Utah is hereby authorized to appoint officers in said territory to fill vacancies which may be caused by a failure to elect on the first Monday in August, 1882, in consequence of the provisions of an act entitled 'An act to amend section 5352 of the revised statutes,'" etc.

This act was approved August 7, 1882, the day appointed by law for the annual election in Utah, and it is conceded that the election failed

in consequence of the provisions of the first-named act, commonly called the "Edmunds act."

The law authorizing the governor to fill vacancies caused by a failure to elect at the election of August, 1882, is commonly called the Hoar amendment. At the time of its passage the statutes of the territory provided "that on the first Monday in August, 1874, and every two years thereafter, there shall be elected by the qualified electors of the several counties of Utah territory one probate judge, whose term of office shall be two years, and until his successor is elected and qualified." The first Monday in August was also the day for the general election: Comp. Laws 1876, sec. 18.

On the first Monday in August, 1880, the defendant was elected to the office of probate judge of Salt Lake county, and shortly after entered upon the duties of his office. By the law just quoted, the successor of the defendant would have been elected at the election on the first Monday in August, 1882, had that election been held. Had such a successor been elected, there is no question but what he would have been entitled to the office by filing the bond and oath of office. As we have seen, that election was not held, because congress, by section 9 of the Edmunds act, vacated all election offices in the territory, and those appointed by the president under the provisions of that section had not qualified and were not in a position to conduct the election on the day provided by the statutes of the territory. The condition of affairs was brought to the attention of congress, and it passed the law authorizing the governor to make appointments: 13 Cong. Record, part 7, pp. 6778, 6796, 6891, 6941, 6981, 6982.

Until the passage of this law, the governor had no authority to appoint to office, except in certain particular cases. All the power he had to make the appointment of the defendant was derived from this law.

It is our view that this law must be construed to substitute the appointment by the governor for the election by the voters of the county. In this view we think there can be no question but what a vacancy existed at the time the plaintiff was appointed. The law certainly was intended for some purpose, and should be construed so as to effect that purpose. Under the construction asked by the defendant, the law becomes a dead letter. There was not, if what he contends is correct, an office to which it could apply. Congress must be presumed to have known, when it passed the law in question, the provisions of the territorial laws regarding elections and the tenure of office, and that successors to most of the officials in the territory would have been elected on the first Monday in August, 1882. Knowing this, and that the election could not be held in consequence of the provisions of its earlier act, in order to prevent any confusion that might arise because of this failure to elect successors to the then incumbents, it passed the Hoar amendment, authorizing the governor to appoint in lieu of election.

When, as in this case, the words of the statute are not explicit, the intention is to be collected from the context, from the occasion and necessity from the law, from the mischief felt, and the object and

remedy in view, and the intention to be taken or performed according to what is consonant to reason and good discretion: Dwarris on Statutes, etc., 194, note 13. What was the occasion for the passage of the law in question? Plainly the failure of the August election. What was the mischief felt? The fear that confusion would arise from the failure of the election. What was the object and remedy in view? The object was to prevent confusion; the remedy the appointment of officers to succeed the incumbents, in the same manner as though the election had been held.

The defendant was a polygamist at the time of the appointment of the plaintiff and had been such for a long time prior thereto: Murphy v. Ramsey, 114 U. S. 41. This fact alone was sufficient to make the office held by him vacant, without reference to the Hoar amendment. The eighth section of the Edmunds act expressly provides that "no polygamist, bigamist, or any person cohabitating with more than one woman . . . . shall be entitled to vote at any election, ... or be eligible for election or appointment, or be entitled to hold any office . . . . in or under any territory of the United States." This law stands in relation to the territories as a constitutional provision. Congress has supreme control of all the territories, and the laws enacted by congress for their government are and must be supreme, any law of a territory to the contrary notwithstanding: National Bank v. County of Yankton, 101 U. S. 129; Ferris v. Higley, 20 Wall. 375; Organic Act, sec. 6. There can be no doubt but what congress, by the Edmunds act, intended to vacate all offices held by polygamists, and to disqualify all such persons from holding office, without reference to whether they had committed the crime of polygamy as described and defined in the first section of the act. Congress knew at the time of the passage of this law, and this court must take judicial notice of the fact, that polygamy had existed in this territory.

For years congress had been endeavoring to suppress it, by denouncing it as a crime to be punished by severe penalties. Notwithstanding the laws the practice had continued. Our judicial annals show that up to the time of the passage of the Edmunds act there had been but one or two convictions. Taking into consideration the failure of the laws to effect the purpose for which they were passed, it seems to us that a very slight examination of the Edmunds act, and of the causes which led to its adoption, will satisfy everyone that the intention of congress was to provide a twofold remedy, the one criminal and the other civil. The act plainly said that polygamists shall no longer hold office and receive honors and emoluments from the hands of the government whose laws they violate and defy.

We also think that when the governor appointed and commissioned the plaintiff that it gave him *prima facie* title to the office. It imposed upon any one contesting the burden of showing a better title: People v. Head, 25 Ill. 325. In establishing a better title the qualifications of the defendant would have been in issue—the question would have arisen whether he was or was not a polygamist.

The question as to whether a vacancy existed in the office, which we

have just considered, was squarely before this court in the case of Kimball v. Richards, decided February 10, 1883. No opinion was filed, but the issue upon the pleadings and the judgment of the court show that the court then held that the question should be answered as we have answered it.

2. The action was properly brought. It has been held that the title to an office may be determined in an action by the claimant thereof for money had and received, to recover the fees from a wrongful intruder: Glascock v. Lyons, 20 Ind. 1; Allen v. McKean, 1 Sumn. 276; United States v. Addison, 22 How. 174; Dolan v. Mayor, 68 N. Y. 274. The defendant usurped the office. He was a wrong-doer from the moment he was notified that his successor had been appointed and had qualified. An action lies against a person who has usurped an office, and received its known and accustomed fees: 1 Ch. Pl. 400; 1 Selw. N. P. 81; Boyter v. Dodworth, 6 T. R. 681; Powell v. Milbank, 1 Id. 399; Sadler v. Evans, 4 Burr. 1984; Lightly v. Clouston, 1 Taunt. 113; Howard v. Wood, 2 Lev. 245; Allen v. McKean, 1 Sumn. 276; Dolan v. Mayor, 68 N. Y. 274. We do not think that in law the defendant held the office in good faith. He was promptly notified of the appointment of his successor, but he declined to yield up the office. He must bear the consequences of his own mistake. "When one of two innocent men must suffer, he through whom it occurred must bear the loss." The defendant, in the eye of the law, was a wrong-doer.

The title of the plaintiff to the office in question was set forth in the complaint as well as his claim for the fees of the office. The defendant did not demur to the complaint, but answered and denied each allegation. If the defendant is right, then there is a misjoinder of actions, and he should have demurred specially. Not having done so, we think he must be deemed to have waived the objection: Macondray v. Simmons, 1 Cal. 393; Marius v. Bicknell, 10 Id. 217; see Laws of Utah 1884, secs. 292–295; Bliss on Code Pl., sec. 417; Boone on Code Pl., sec. 265.

3. We think the measure of damages was correctly determined by the court. It is true that there was no salary attached to the office and the incumbent was paid in fees. It is also true that the value of the services of the defendant was equal to all that he received. So, in a case of an officer who is paid by a salary, the value of his services is equal to the salary which he receives. The law aims at compensation. The defendant wrongfully prevented the plaintiff from holding the office to which he was entitled, and wrongfully received and appropriated the emoluments of the office. To say that the defendant can retain any part of the fees of the office would be to say that he can be allowed to reap a benefit from his own wrong. This he cannot do: State v. Steers, 44 Mo. 223.

There is no error in the record, and the judgment of the court below must be affirmed with costs.

ZANE, C. J., and BOREMAN, A. J., concurred.

No. 9,168.

HAGELY *v.* HAGELY.

Department Two. Filed January 19, 1886.

SEVERAL DEFENSES — FAILURE TO STATE SEPARATELY — OBJECTION HOW TAKEN.— Under section 444 of the code of civil procedure, an answer containing several defenses, not separately stated, cannot be demurred to, such defect can only be reached by motion to strike out, or by some other appropriate proceeding.

DEMURRER TO ANSWER—AMENDED ANSWER—WAIVER OF OBJECTION.—Where separate defenses are set up in an answer, and a demurrer is sustained to one or more of such defenses, and the defendant subsequently files an amended answer, it will amount to a waiver of error as to such defenses as are pleaded anew in such amended answer, but not as to defenses to which the demurrer was sustained, and which are not again pleaded in the amended pleading.

STATUTE OF LIMITATIONS—PLEADING—EVIDENCE UNDER.—Under section 458 of the code of civil proceedure, giving the right to plead the statute of limitations by referring to the section prescribing the time within which an action may be brought, the reference to the section when thus made stands in lieu of, and warrants the proof of every essential fact, precisely as though set out at full in the answer.

APPEAL from a judgment of the superior court of Napa county, entered in favor of the plaintiff, and from an order denying the defendant a new trial. The opinion states the facts.

Spencer & Henning, for the appellant.

Joy & Hamand, and *J. N. Young*, for the respondent.

SEARLS, C. This is an action of ejectment to recover land situate in the county of Napa. Plaintiff had judgment, from which, and from an order denying a new trial, defendant appeals.

The amended answer of defendant sets up several separate defenses. A demurrer was interposed thereto by plaintiff, which was sustained by the court, to the second cause of defense in such answer, and the ruling is assigned as error.

The portion of the answer at which the demurrer was aimed, and to which it was sustained, averred that plaintiff's cause of action was barred by the statute of limitations, to wit, by the provisions of sections 318 and 319, and subdivision 3 of section 323, of the code of civil procedure of the state of California, and then proceeds to state that defendant and plaintiff for many years lived and cohabited together as man and wife; that children were born to them; that the land in question was purchased with the funds of defendant for the benefit of herself and children; that a deed was taken therefor in the name of plaintiff, and other facts tended to show that plaintiff held the title in trust for defendant.

At least two separate defenses were contained in this portion of the answer, which were not separately stated.

This, however, is not one of the causes for which a demurrer to an answer may be interposed: Code Civ. Proc., sec. 444; such a defect can only be reached by motion to strike out, or by some other appropriate proceeding.

Some of its allegations are also subject to the charge of being ambig-

uous, unintelligible, and uncertain in this, that it is left uncertain thereby whether defendant intended to set forth the facts as a plea of the statutes of limitations, or as an equitable defense to plaintiff's cause of action.

The demurrer was properly sustained.

It is proper to state, also, that subsequent to the order sustaining the demurrer, defendant filed an amended answer, in which she interposed the plea of the statute of limitations.

Her counsel insist in their brief that the facts set out in the defense demurred to were stated as a plea of the statute of limitations.

If this be true, the subsequent amended answer, setting up substantially the same defense, was a waiver of the error, if any, in sustaining the demurrer.

Where separate defenses are set up in an answer, and a demurrer is sustained to one or more of such defenses, and the defendant subsequently files an amended answer, it will amount to a waiver of error as to such defenses as are pleaded anew in such amended answer, but not as to defenses to which the demurrer was sustained, and which are not again pleaded in the amended pleading.

In other words, it is not the new pleading which operates as a waiver, but the pleading anew of the same defense.

It is but just to counsel for appellant to state that they claim, and may be correct in their assumption, that the answer subsequently filed is but an engrossed copy of the previous answer, with the portions to which the demurrer had been interposed eliminated.

As this question cannot alter the conclusion hereafter reached, or impair the rights of appellant, we have preferred to treat the answer filed March 23, 1883, as an amended answer.

2. At the trial plaintiff introduced in evidence a patent from the government of the United States to one Charles H. Fitch, deeds of conveyance from Fitch to Joseph Reed, and from Reed to himself, and a stipulation admitting defendant in possession, and thereupon rested his cause, whereupon the defendant, for the purpose of sustaining the issues on her part, as made by the pleadings, took the stand as a witness in her own behalf, and offered to prove and show in evidence, by herself and other witnesses, that she had been continuously since June 8, 1872, in the open, notorious, and exclusive and continued adverse possession of the premises in dispute, claiming the same as her own as against the plaintiff and all the world, and during said time had the same inclosed by a substantial fence; that a greater portion thereof had been during all of said time cultivated; that she had paid all taxes assessed thereon, and in short, all the facts necessary to constitute an adverse possession.

Plaintiff objected to the introduction of the evidence on the ground that it was incompetent, irrelevant, and not responsive to the issues, and because defendant had only set up a claim of adverse possession in her answer founded upon a written instrument, etc., and therefore cannot prove an adverse possession not founded upon such written instru-

ment, etc. The court sustained the objection and excluded the testimony.

The offer of defendant was made in various forms and a like ruling was had and exceptions taken, but the above sufficiently explains the real question involved.

The amended answer sets up as a defense that plaintiff's cause of action is barred by the provisions of section 318 of the code of civil procedure of the state of California.

It then, as another and separate defense, sets out that the cause of action is barred by section 319, and in like manner pleads as a bar, section 323, and in like manner subdivision 1 of section 323, and also subdivision 3 of section 323, of the same code, all of which are severally stated as separate defenses in the manner provided by section 458, code of civil procedure, for pleading the bar of the statute.

Section 318 of the code of civil procedure was properly pleaded in bar of plaintiff's right to recover.

It provides that "no action for the recovery of real property, or for the recovery of the possession thereof, can be maintained, unless it appear that the plaintiff, his ancestor, predecessor, or grantor was seised or possessed of the property in question, within five years before the commencement of the action."

Under this plea defendant was entitled to introduce in evidence any and all testimony tending to establish her right under the statute.

It is true that defendant also pleaded section 319 of the code of civil procedure as a bar to the action.

This last section has no application to actions to recover possession of real estate, but applies to personal actions founded upon the title to real property, as actions to recover rent, damage to real property, etc.: Richardson v. Williamson, 24 Cal. 290; Bissel v. Henshaw, 1 Saw. 559.

She likewise pleaded section 323 of the same code, and the first and third subdivisions of the same section.

Section 323 simply defines what, for the purpose of constituting adverse possession, shall be deemed possession by one claiming title founded upon a written instrument, etc.

It relates to the character of evidence necessary under the given circumstances to sustain an adverse possession—relates to testimony by which a right to possession under section 318 may be sustained, but does not in itself define the consequences to follow the adverse possession. It need not be pleaded, but like the payment of taxes provided for by the proviso to section 325, and any other facts going to show an adverse holding may be given in evidence under the general plea by reference to section 318. Section 323 was also separately referred to in the answer as a bar to the action.

This did not, however, in any way impair the plea of the statute by reference to section 318, or limit the right of defendant to introduce all proper evidence under the last-mentioned defense.

The allegations and proofs must correspond: Maynard v. F. F. Insurance Co., 34 Cal. 48.

But under section 458 of the code of civil procedure, giving the right to plead the statute of limitations by referring to the section prescribing the time within which an action may be brought, the reference to the section when thus made stands in lieu of, and warrants the proof of every essential fact, precisely as though set out in full in the answer.

It follows that the court below erred in excluding the proffered evidence, and that the judgment and order appealed from should be reversed, and a new trial granted.

BELCHER, C. C., and FOOTE, C., concurred.

By the COURT. For the reasons given in the foregoing opinion, the judgment and order are reversed, and cause remanded for a new trial.

No. 11,161.

GLENN, TRUSTEE, v. SAXTON.

Department One. Filed January 21, 1886.

CORPORATIONS—STOCKHOLDER'S LIABILITY FOR UNPAID SUBSCRIPTIONS—STATUTE OF LIMITATIONS.—The defendant, in the state of New York, in 1865, subscribed to certain shares of stock of the National Express and Transportation Company, a corporation organized under the laws of Virginia. The laws of that state required that upon every subscription for shares in any joint-stock company there should be paid upon each share two dollars at the time of subscribing, and the residue thereof as required by the president and directors. On December 14, 1880, in a suit instituted in the chancery court of the city of Richmond, Va., it was decreed that thirty per cent of the par value of each share of stock should be called for, and required to be paid by the subscribers, for the purpose of paying the debts of the corporation: *Held*, that under the defendant's contract of subscription his liability for the unpaid portion thereof did not become fixed until a call by the president and directors; that the call made by the chancery court was the same, in effect, as if it had been made by such officers; and that the statute of limitations commenced to run against defendant's liability for such call from the date of the decree, and that under section 339 of the code of civil procedure such liability was barred in two years.

APPEAL from a judgment of the superior court of Los Angeles, entered in favor of the defendant. The opinion states the facts.

Glassell, Smith, & Patton, for the appellant.

Graves & Chapman, for the respondent.

ROSS, J. Glenn, Trustee, v. Williams, 60 Md. 93, was an action similar to the present one, and it is insisted by the appellant's counsel that every point involved on this appeal was decided in appellant's favor by the court of appeals of Maryland in the case there. If the fact were true, it would deservedly have great weight with us. But in respect to the statute of limitations, the two cases differ materially. The decree of the chancery court of Richmond, Virginia, by virtue of which the plaintiff in both actions proceeded, was given on the fourteenth of December, 1880. The Maryland suit was commenced April

9, 1881. The action here was commenced August 12, 1884. In Maryland the statute of limitations provides that "all actions of account, actions of *assumpsit* or on the case, actions of debt on simple contract or for rent in arrear, detinue, and replevin, all actions for trespass for injuries to real or personal property, shall be commenced or sued within three years from the time the cause of action accrues:" Maryland Code, sec. 1, art. 57; and that three-years statute was pleaded in bar of the action there. Here, the provisions of the code prescribing the periods for the commencement of actions other than for the recovery of real property are, among others, as follows:

"Within five years:

"1. An action upon a judgment or decree of any court of the United States, or of any state within the United States."

"Within three years:

"1. An action upon a liability created by statute, other than a penalty or forfeiture."

"Within two years:

"1. An action upon a contract, obligation, or liability, not founded upon an instrument of writing or founded upon an instrument of writing executed out of the state:" Code Civ. Proc., secs. 335, 336, 338, 339. By section 343 of the same code it is further provided: "An action for relief not hereinbefore provided for must be commenced within four years after the cause of action shall have accrued."

If the cause of action in the Maryland case did not accrue until the passing of the decree of the chancery court of Richmond, as was held, and we think correctly held, by the court of appeals of Maryland, of course the action there could not be barred by the three years' statute of limitations; for the suit was commenced within a few months after the making of the decree. Here, however, the action was not commenced until more than three, but less than four years after the making of the Richmond decree; and the question is whether it is barred by the provisions of the statute of this state, which are pleaded by the defendant in bar thereof.

A statement of the case, therefore, becomes necessary. The action is to recover from defendant, who held certain stock of the National Express and Transportation Company, a corporation organized under the laws of the state of Virginia in the year 1865, an assessment levied upon his stock by a judgment of the chancery court of the city of Richmond. The complaint contains two counts—both identical in their allegations, except by the one plaintiff seeks to recover the assessment on fifty shares of stock originally subscribed by defendant, and by the other to recover the assessment on fifty shares of which he became the owner by assignment. The National Express and Transportation Company, according to the averments of the complaint, was a body corporate, duly incorporated under the laws of the state of Virginia, for fifty shares of the capital stock of which the defendant on the first day of November, 1865, in the state of New York, subscribed and thereby undertook and promised to pay to the corporation for each and every

share so subscribed the sum of one hundred dollars in such installments and at such times as he might be lawfully called upon to pay according to the legal tenor and effect of the law under which the corporation was organized.

In September, 1866, the corporation executed a deed of assignment of all its property and effects to certain trustees for the benefit of its creditors. Subsequently, a suit was instituted in the chancery court of the city of Richmond, Virginia, by one Wright and other persons, claiming to be creditors of the corporation, against the corporation, its officers, and the trustees, in which cause a judgment was made and entered on the fourteenth day of December, 1880, whereby the plaintiff in the present action was appointed and constituted trustee in the place and stead of the trustees to whom the assignment was made by the corporation; and whereby it was further adjudged and decreed that a large amount of debts secured by the trust deed remained unpaid and entitled to be paid out of the property conveyed by the deed, and that of the sum of one hundred dollars for each and every share of the stock of the corporotion undertaken and promised to be paid by the subscribers thereof in such installments, and at such times as such subscribers and their assigns might be lawfully required to pay the same according to the legal tenor and effect of the law under which the corporation was organized and the stock subscribed for, the sum of eighty dollars per share had never theretofore been called for or required to be paid by the president and directors of the corporation, and that said sum of eighty dollars per share for each and every share of the stock subscribed for still remained liable to be called for and required to be paid by the subscribers and their assigns, and whereby it was further adjudged and decreed, that it was necessary and proper that thirty per cent of the par value of each share of said stock should be called for and required to be paid by the subscribers and their assigns, for the purpose of paying the debts of the corporation under the provisions of the trust deed; and it was accordingly further adjudged and decreed, that a call and assessment be, and the same thereby was, made upon the stock and stockholders of the said corporation and their assigns of thirty per cent of the par value of said stock, being thirty dollars on each and every share thereof, and that the stockholders of the corporation and each and every of them and their legal representatives and assigns be, and they thereby were, severally required to pay the several amounts by the decree called for and assessed to the plaintiff as trustee.

It is also averred in the complaint herein that the plaintiff accepted the trust and duly qualified as trustee, and that the defendant has failed and refused to pay, etc. Appropriate allegations are also made as to the jurisdiction of the chancery court of Richmond, and as to the laws of the state of Virginia. Among the provisions of those laws there is one which declares that upon every subscription for shares in any joint-stock company there shall be paid upon each share two dollars at the time of subscribing, and the residue thereof as required by

the president and directors; and if any money which any stockholder has to pay upon his shares be not paid as required by the president and directors the same, with interest thereon, may be recovered by warrant or action, according to amount, etc. "All subscriptions to the stock of this corporation," said the court of appeals of Maryland in the case already cited, "had reference to that provision of the statute, and the conditions or requirements there prescribed formed terms in the contract of subscription. After the payment of the two dollars per share, there was nothing due from the subscriber to stock until an authorized call was made for the residue.

"The contract contemplated the exercise of judgment and discretion on the part of the president and directors as to the times and amounts of future payments on the stock, and there was nothing due from the stockholder until such amounts were determined on, and regularly called for. Until a regular call made, there was no unconditional liability on the part of the stockholder to pay. Until then he could not know when to pay, or how much he would be required to pay. The subscription therefore was conditional, as to the times and amounts of payments; and consequently there was no fixed obligation of the stockholder to pay, and no right of action against him, until an assessment and call made, either by the president and directors, or by the order of a court of competent jurisdiction. It is for the amount of the assessment made that the right of action accrues, and not for the whole balance of the unpaid subscription, unless the whole amount be called for; and it is only from the time of the assessment and call made that the statute [of limitations] runs in favor of the defendant." In this we entirely agree. The terms of the statute became a part of the contract of subscription. The subscriber undertook to pay two dollars per share at the time of subscribing, and the residue of the subscription-price as required by the president and directors.

The call made by the chancery court was the same, in effect, as if it had been made by the president and directors of the corporation, and when made the contract of the defendant to pay became absolute, and a cause of action against him for the amount of his assessment accrued in favor of the trustee appointed by the court. The foundation of this cause of action was the defendant's contract to pay the residue of his subscription as required, and having been made without this state the action should have been brought within two years after the right of action accrued: Code Civ. Proc., sec. 339. If correct in this view, and we have no doubt of its correctness, it is quite clear that the case in hand is not founded on a judgment or decree within the meaning of section 336 of the code of civil procedure.

Judgment affirmed.

McKinstry and McKee, JJ., concurred.

Stockholder's Liability on Unpaid Subscriptions for Debts of Corporation.—It is a well-established rule in equity that the capital stock and other assets of a corporation constitute a trust fund for the payment of its debts. This fund includes all sums unpaid upon the shares of the stockholders; and, by appropriate proceedings in

equity, the stockholders may be made liable for the payment of the debts to the extent that they have not paid up their shares. In Sanger v. Upton, 91 U. S. 60, Mr. Justice Swayne thus stated the doctrine: "The capital stock of an incorporated company is a fund set apart for the payment of its debts. It is a substitute for the personal liability which subsists in private copartnerships. When debts are incurred, a contract arises with the creditors that it shall not be withdrawn or applied otherwise than upon their demands, until such demands are satisfied. The creditors have a lien upon it in equity. If diverted they may follow it as far as it can be traced, and subject it to the payment of their claims, except as against holders who have taken it *bona fide*, for a valuable consideration, and without notice. It is publicly pledged to those who deal with the corporation for their security. Unpaid stock is as much a part of this pledge, and as much a part of the assets of the company, as the cash which has been paid upon it. Creditors have the same right to look to it as to anything else, and the same right to insist upon its payment as upon payment of any other debt due to the company. As regards creditors, there is no distinction between such a demand and any other asset which may form a part of the property and effects of the corporation." To the same effect, see Thompson v. Reno Savings Bank, 8 West Coast Rep. 634; Thompson v. Lake, 6 Id. 533; 7 Id. 495; Curran v. Arkansas, 15 How. 304; Hatch v. Dana, 101 U. S. 205; Briggs v. Penniman, 18 Am. Dec. 454; Allen v. Montgomery R. R. Co., 11 Ala. 437; Bingham v. Rushing, 5 Ill. 403; De Mony v. Johnston, 7 Id. 51; Smith v. Huckabee, 53 Id. 195; Mann v. Pentz, 3 N. Y. 422; Graham v. Hoy, 38 N. Y. Sup. Ct. 506; Bartlett v. Drew, 4 Lans. 444; 57 N. Y. 587; Hastings v. Drew, 76 Id. 9; Harmon v. Page, 10 Pac. C. L. J. 634; Ward v. Griswoldsville etc. Co., 16 Conn. 593; Hightower v. Thornton, 8 Ga. 486; Robinson v. Conrey, 5 La. Ann. 297; Payne v. Bullard, 23 Miss. 88; Adler v. Milwaukee Pat. Brick Co., 13 Wis. 61; Wood v. Dummer, 3 Mason, 308; Haskins v. Harding, 2 Dill. C. C. 106. In some cases it has been held, that stockholders are liable for the debts of the corporation, contracted with their consent, even beyond the amount of their capital stock: Hume v. Winyan etc. Co., 1 Car. L. J. 217; Hightower v. Thornton, 8 Ga. 499. In South Mountain etc. Co., 8 Saw. 30, Hoffman, J., examined the law affecting the liability of stockholders in mining companies organized in California, and held that the general doctrine that a stockholder is liable for the debts of the corporation, to the extent that his shares remain unpaid, did not apply to such corporations, for the reason that the nominal value of the capital stock in such corporations is purely arbitrary, and has no reference to the value of the property of the corporation, and that one taking stock therein enters into no contract, express or implied, to pay the par value of his shares; that assessments on such stock can be enforced only by a sale of the stock, and that the only remedy of creditors of the corporation against the stockholders personally is that given by statute.

LIABILITY OF STOCKHOLDER, HOW ENFORCED: See this subject discussed at length in note to Freeland v. McCullough, 43 Am. Dec. 701.

No. 20,124.

PEOPLE v. PHILLIPS.

Department Two. Filed January 22, 1886.

FORGERY—COUNTERFEIT PROMISSORY NOTE—EVIDENCE OF DAMAGE.—In a prosecution for forgery, in having feloniously, etc., uttered, published, and passed to one E. a counterfeit paper, in writing, as a genuine promissory note of one F., with the intent to prejudice, defraud, and damage the said E., evidence is admissible that, by reason of the passing of the paper, E. was damaged by being induced to make a journey, and was put to expense therein.

APPEAL from a judgment of the superior court of Napa county, entered upon a verdict convicting the defendant, and from an order denying him a new trial. The opinion states the facts.

Coghlan & Coombs, for the appellant.

E. C. Marshall, attorney-general, for the respondent.

MYRICK, J. The information in this case accused the defendant of the crime of forgery, in having feloniously, willfully, and unlawfully uttered, published, and passed to one Elgin a counterfeit paper in writing as a genuine promissory note of one Fitch, with the intent to prejudice, defraud, and damage the said Elgin.

Elgin, as the agent of Fitch, was endeavoring to collect from Phillips a debt due Fitch of fifty-five dollars and fifty cents. In so far as Phillips attempted to pass, and did pass, the paper in payment of that debt, the evidence would not have justified a conviction, because the information charged the act to have been committed with intent to defraud Elgin instead of Fitch. But there is evidence that in consequence of the passing of the paper Elgin in person was prejudiced, defrauded, and damaged, viz., by his being induced to make the trip from St. Helena to Napa, and pay the expense of recording the mortgage. The making of that trip, and the payment of that expense, were parts of the one transaction, viz., imposing upon Elgin by the uttering of the false paper; and the court committed no error in admitting proof of those facts. No error appears in the record.

Judgment and order affirmed.

MORRISON, C. J., and SHARPSTEIN, J., concurred.

No. 20,144.

PEOPLE *v.* AH TOON.

In Bank. Filed January 22, 1886.

ASSAULT WITH INTENT TO COMMIT MURDER—ALLEGATIONS OF INFORMATION—MALICE.—An information for the crime of assault with intent to commit murder, which alleges that the defendant committed the act "willfully and with malice aforethought" need not aver that the act was done unlawfully. The allegation of malice implies the unlawfulness of the assault.

APPEAL from a judgment of the superior court of Trinity county, entered upon a verdict convicting the defendant, and from an order denying him a new trial. The opinion states the facts.

W. J. Tinnin and Jo. Hamilton, for the appellant.

E. C. Marshall, attorney-general, for the respondent.

MYRICK, J. The information in this case charges the defendant with "the crime of assault with the intent to commit murder, committed as follows: The said Ah Toon . . . . did willfully, and with malice aforethought, with a hatchet then and there cut one Nun Keow, with intent to kill her the said Nun Keow."

1. As section 187, penal code, defines murder to be "the unlawful killing of a human being, with malice aforethought," and as the defendant was accused of the crime of an assault with intent to commit murder, it is urged that the information should have charged the act to have been done unlawfully; that the act may have been done willfully, and with malice aforethought, and yet have been justifiable. It is true a justifiable act may be done willfully, and it may be none the less justifiable because willful; but we find in 2 Bouv. Law Dict., the definition of "malice" to be, as to criminal law, "the doing a wrongful act intentionally without just cause or excuse;" and the writer continues: "Malice is never understood to denote general malevolence or unkindness of heart, or enmity toward a particular individual, but it signifies rather the intent from which flow any unlawful and injurious act committed without legal justification. . . . . It is not confined to the intention of doing an injury to any particular person, but extends to an evil design, a corrupt and wicked notion against some one at the time of committing the crime."

In the light of this language, when the defendant was accused of having, with malice aforethought, with a hatchet, cut Nun Keow with intent to kill her, it is equivalent to saying that he did the act unlawfully. If malice implies, as is above stated, the intent to do a wrongful act, it follows that the act must be unlawful, and therefore not justifiable.

We find authority for this conclusion in section 7, subdivision 4, penal code; also in Maynard v. F. F. Ins. Co., 34 Cal. 48, and People v. Taylor, 36 Id. 255, in which cases it is affirmed that "malice, in common acceptation, means ill-will against a person, but in its legal sense it means a wrongful act, done intentionally, without just cause or excuse."

We find no error in the record; the judgment and order are therefore affirmed.

MORRISON, C. J., and MCKEE, SHARPSTEIN, MCKINSTRY, ROSS, and THORNTON, JJ., concurred.

No. 9,238.

CASEY ET AL. *v.* JORDAN ET AL.

Department One. Filed January 22, 1886.

OPINION, REPORTED ANTE, PAGE 484, MODIFIED.

APPEAL from a judgment of the superior court of the city and county of San Francisco. The prior opinion is reported *ante*, page 484.

Sawyer & Ball, for the appellants.

T. J. Crowley, for the respondents.

The COURT. It is ordered that the following sentence be added at the end of the opinion herein: "The judgment, however, is a general

judgment in favor of defendants. It should only have adjudged that the action abate."

It is further ordered that the judgment heretofore given be modified so as to read: "Cause remanded with directions to the court below to modify the judgment as above indicated."

END OF VOLUME VIII.

[SUPPLEMENT.]

SUPERIOR COURT, CITY AND COUNTY OF SAN FRANCISCO, CALIFORNIA.

WM. KOHL, J. L. MOODY AND M. REHFISCH *v.* P. N. LILIENTHAL, F. A. BENJAMIN, A. W. FOSTER, J. W. PEW, W. H. TURRILL, E. SCOTT, F. A. BERLIN AND THE HEAD CENTRE CONSOLIDATED MINING COMPANY.

Filed October 24, 1885.

William M. Pierson, Stewart & Herrin and *J. T. Lewis*, for the plaintiffs.

Messick & Maxwell, Garber, Thornton & Bishop and *F. A. Berlin*, for the defendants.

SULLIVAN, J. Plaintiffs bring this action as the holders and owners of sixty-three thousand one hundred and thirty-eight shares of the stock of the Head Centre Consolidated Mining Company, to compel the defendants to transfer, issue and deliver to them thirty-nine thousand one hundred and fifteen shares of stock of the Head Centre and Tranquility Mining Company, and to restrain defendants from representing, voting or dealing in any way with said thirty-nine thousand one hundred and fifteen shares of stock to which plaintiffs claim to be entitled.

Plaintiffs claim title to the stock in the Head Centre and Tranquility Company stock by reason of their ownership of the stock of the Head Centre Consolidated Company.

The testimony shows that in the summer of 1882, two mining companies were in possession of adjoining mining claims in the Tombstone mining district, Arizona. One, the Tranquility Mining Company, was a New Jersey corporation; the other, the Head Centre Consolidated Mining Company, was a California corporation. Expensive and protracted litigation was pending between said corporations, and it occurred to the stockholders in both companies that it would be to the mutual interest of both companies to consolidate the properties, and discontinue the litigation. Negotiations looking to a consolidation, were carried on for several months, and by common consent of the stockholders of both companies, an arrangement was arrived at, which was to be consummated by the formation of a new corporation to be called the Head Centre and Tranquility Mining Company.

The formation of the new company was regarded as the only feasible method of consolidating the two concerns, for the reason that one of the corporations was a New Jersey corporation, and, therefore, not subject to the provisions of the civil code with reference to consolidation. It was agreed that both the old companies should deed their properties to the new company in consideration of the stock of the new company.

F. A. Benjamin and *T. E. Jewell* to sell and cause to be conveyed the mining grounds, etc., for the sum of five dollars, and one hundred thousand shares of stock, for each of the properties.

Neither the Head Centre nor Tranquility Company, as such, was a party to the negotiations prior to that date, and they were to be considered in connection with the consummation of the arrangement, already agreed upon, only to the extent that corporate agencies might be necessary to properly vest the title in the new company. So when the deed was actually executed, the stock issued by the secretary of the new company was issued according to the instructions of Benjamin and Jewell, not to the corporations conveying the mining grounds, but to Pew and Kohl as trustees.

After the stock was thus issued, it was treated as stockholders' stock, and its custody and management were regulated, not by the several corporations, but by the prior agreement of the two sets of stockholders.

The partial testimony of the plaintiffs, the negative corroboration of that testimony by defendants, borne out by the recorded acts of all parties, satisfy my mind that the arrangement as planned and executed, was a consolidation of the interests of the two old sets of stockholders in the new Head Centre and Tranquility Company. This conclusion is consistent with all the testimony, oral and written, and is in perfect harmony with the conduct of all parties, which, to to my mind, is the strongest evidence of its correctness.

Assuming then, that the transfer of the Head Centre mining ground to the Head Centre and Tranquility Company, was the act of the body of the Head Centre stockholders, and that the stock was issued to defendant Pew as trustee for the Head Centre stockholders, is the transaction so far repugnant to the statutes and to the general principles of equity jurisprudence that its full performance will not be enforced by a court of equity.

Defendants claim that the directors of the corporation defendant have no authority to distribute the stock in question because that would be in violation of section 309 of the civil code.

The language of that section so far as important is as follows: "The directors of corporations must not make dividends except from the surplus profits arising from the business thereof; nor must they divide, withdraw, or pay to the stockholders, or any of them, any part of the capital stock; nor must they create debts beyond their capital stock; or reduce or increase the capital stock, except as hereinafter specially provided."

This language is substantially the same as the thirteenth section of the act of 1853: Stats. 1853, p. 89. In the case of Martin v. Zellerbach, 38 Cal., 300, the statute of 1853 was considered by the supreme court of this state. That was an action by a creditor of one of two corporations that had attempted a consolidation in the manner followed in this case. The supreme court justly held in that case that the claims of the creditor could not be prejudiced by the action of the debtor corporation in disposing of its entire assets

share so subscribed the sum of one hundred dollars in such installments and at such times as he might be lawfully called upon to pay according to the legal tenor and effect of the law under which the corporation was organized.

In September, 1866, the corporation executed a deed of assignment of all its property and effects to certain trustees for the benefit of its creditors. Subsequently, a suit was instituted in the chancery court of the city of Richmond, Virginia, by one Wright and other persons, claiming to be creditors of the corporation, against the corporation, its officers, and the trustees, in which cause a judgment was made and entered on the fourteenth day of December, 1880, whereby the plaintiff in the present action was appointed and constituted trustee in the place and stead of the trustees to whom the assignment was made by the corporation; and whereby it was further adjudged and decreed that a large amount of debts secured by the trust deed remained unpaid and entitled to be paid out of the property conveyed by the deed, and that of the sum of one hundred dollars for each and every share of the stock of the corporotion undertaken and promised to be paid by the subscribers thereof in such installments, and at such times as such subscribers and their assigns might be lawfully required to pay the same according to the legal tenor and effect of the law under which the corporation was organized and the stock subscribed for, the sum of eighty dollars per share had never theretofore been called for or required to be paid by the president and directors of the corporation, and that said sum of eighty dollars per share for each and every share of the stock subscribed for still remained liable to be called for and required to be paid by the subscribers and their assigns, and whereby it was further adjudged and decreed, that it was necessary and proper that thirty per cent of the par value of each share of said stock should be called for and required to be paid by the subscribers and their assigns, for the purpose of paying the debts of the corporation under the provisions of the trust deed; and it was accordingly further adjudged and decreed, that a call and assessment be, and the same thereby was, made upon the stock and stockholders of the said corporation and their assigns of thirty per cent of the par value of said stock, being thirty dollars on each and every share thereof, and that the stockholders of the corporation and each and every of them and their legal representatives and assigns be, and they thereby were, severally required to pay the several amounts by the decree called for and assessed to the plaintiff as trustee.

It is also averred in the complaint herein that the plaintiff accepted the trust and duly qualified as trustee, and that the defendant has failed and refused to pay, etc. Appropriate allegations are also made as to the jurisdiction of the chancery court of Richmond, and as to the laws of the state of Virginia. Among the provisions of those laws there is one which declares that upon every subscription for shares in any joint-stock company there shall be paid upon each share two dollars at the time of subscribing, and the residue thereof as required by

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[SUPPLEMENT.]

SUPERIOR COURT, CITY AND COUNTY OF SAN FRANCISCO, CALIFORNIA. DEPARTMENT NINE, PROBATE.

No. 2,769.

ESTATE OF JOEL NOAH, DECEASED.

November 27, 1885.

PROBATE HOMESTEAD.—Court cannot set apart a probate homestead out of property that could not have been dedicated as such by the parties while living.

POST NUPTIAL SETTLEMENT.—A married woman is estopped by her contract with her husband, relinquishing all her marital claims against his estate, from claiming, after his death, a homestead.

FAMILY ALLOWANCE.—If a married woman separates from her husband for a valuable consideration, relinquishes all her marital claims, both as to her maintenance and against his estate, and is so living apart from him at the time of his death, she is estopped from claiming a family allowance.

APPLICATION for family allowance, and also for homestead. Both applications considered as one. The opinion states the facts.

H. E. Highton, for Harriett T. Noah, applicant.

E. S. Pillsbury, for executors, opposed.

H. G. Platt, Gordon Blanding, Wm. Loewy and *E. N. Deuprey*, for heirs opposed.

J. V. COFFEY, JUDGE. This is an application by Harriett T. Noah, surviving wife and widow of Joel Noah, deceased, testator herein, to whom she was married October 14, 1875, he being a man of about sixty-seven years of age, and possessed of a considerable estate, including the property now in course of administration in this court. Applicant was then but twenty-four years of age, and had been acquainted with testator, Joel Noah, for only three or four months prior to her marriage to him, he having been, for that period, a roomer in her mother's house. Upon the marriage they went to live in Oakland, where they remained two weeks, and then returned to the house of her mother, Mrs. Alice Ascroft, where her husband had been rooming before that event. Five weeks after marriage—Nov. 17, 1875—the spouses separated, Mrs. Noah receiving for herself ten thousand five hundred dollars—five hundred dollars of which she paid her attorney for services in connection with the separation. A paper (articles of separation) was made out between them, and after its execution the lady had no communication whatever with Joel Noah; from that time till his death they were as strangers. She did not attend his funeral, although she saw the notice of his death in the newspaper. These are the facts concerning the relations between the parties, as gathered from the evidence of the widow, applicant, and her mother.

The property out of which the court is asked to select a homestead is a building entirely devoted to business purposes, not sus-

ceptible of partition, of the appraised value of twenty-five thousand dollars.

Each application is resisted on the ground that applicant's rights were waived by the agreement alluded to in the evidence of the applicant, which agreement is referred to and pleaded in bar of this application by the executors, and a copy thereof is annexed to each answer as an exhibit. The answer is not demurred to; but it is contended that this court, sitting in probate, cannot take cognizance of this "waiver." As to the homestead, it is denied that there is a dwelling-house on the premises; but that the building is wholly designed and exclusively used for business purposes.

The objection first to be considered is the "contract of separation" and its effect, if any, upon the application. If it had any effect, it is a bar to this application. Counsel for the applicant, in his very forcible and full argument, cited many cases in which contracts of this character have been held inoperative as against applications for allowance or homestead: 110 Mass., 461; 87 Mass., 5 Allen, 190; 69 Me., 254; 16 Ohio St., 527; 86 Pa. St., 519; 71 N. Y., 157; which cases arose under conditions of the law different from those created by the statutes of California. I have considered with great care all the cases cited, and the conclusions arrived at are dependent mainly upon domestic authorities.

Can the court consider this contract under the pleadings?

If there be imperfections in the mode of pleading it, counsel for the executors may have leave to amend as requested; but no demurrer has been interposed; and, for the purpose, at least, of discussing the principle involved, it is assumed to be well pleaded.

This court, sitting in probate, has power to examine as to title to real estate, so far as to enable it to determine whether the property sought to be set aside as a homestead, is community or separate property: Est. Burton, 64 Cal., 248.

The status of the applicant must be considered by the court: Est. Moore, 57 Cal., 443; and her right to have an allowance set over to her out of the estate may properly be tested by reference to her relations with the deceased and her right, as wife, to call on him for maintenance during his lifetime: Est. Byrne, Myr. Rep., 1.

Every question that goes to the right of the applicant is within the probate jurisdiction: Id.; see also 92 N. Y., 238.

When a decedent, in his lifetime, executed a contract for the sale of real estate, the court must examine and determine its intent and effect, and make decree accordingly: Sections 1,597, 1,600, code of civil procedure.

If the decedent and his wife had entered into a contract for separation and made a division of the common property, thereby intending that each of the spouses should hold their respective shares in severalty, and as their separate estate; and upon the death of the husband the widow applied for a homestead, and alleged it to be community property, the heirs opposing the application alleged it to be separate property of deceased, and offered in evidence the

contract of separation; in such case, to carry out the provisions of section 1,468, code of civil procedure, the court must take testimony, and determine, therefrom, the character of the property. What sort of evidence is admissible? Parol or documentary? If the latter, the court must interpret the meaning or legal effect of the document admitted in evidence.

The attention of the court is called to this "contract of separation," not only by the answer of the executors, but by the testimony adduced in support of the application.

It should seem, therefore, that the court may consider this instrument in connection with the subject matter of the application. What, then, is its effect?

"Either husband or wife may enter into any engagement or transaction with the other, or with any other person, respecting property, which either might, if unmarried, subject in transactions between themselves, to the general rules which control the actions of persons occupying confidential relations with each other, as defined by the title on trusts:" Secs. 158, 2,228, 2,235, civil code.

It will be seen, by an examination of the section quoted, that there is a material modification in the relations *inter sese* of husband and wife in this state, from those obtaining in the states furnishing most of the cases relied upon by counsel for applicant; still subject, however, to the necessity of scrutinizing closely the terms of transactions between persons in such intimate and confidential relations.

First, dealing with the terms of this contract, it appears, therefrom, that it was executed December 6, 1875, when they were living separate and apart from each other, nearly three weeks after their actual parting on November 17, 1875; that such separation arose from unhappy differences, the continuance of which caused them to agree to remain apart during their natural lives; and in consideration of ten thousand five hundred dollars paid by Joel Noah to her, Harriett covenanted with him that she would not incur any indebtedness on the account of said Joel, and that he should not, in any manner, be made liable for her maintenance or for any indebtedness incurred by her, and that she would not, by herself or through any one else, ask of him any alimony, moneys, goods or chattels, for her own use or on her account, and that in the event of the institution of any action for divorce or to annul the marriage, she would not seek alimony, counsel fees or costs of suit; and that in case the marriage should be dissolved by decree or annulled, no judgment should be rendered against him for costs or alimony, or granting to her any share or portion of his property, moneys and estate; and, further, that for the said consideration she forever released, absolved and discharged him, his heirs, executors, administrators and assigns from any claim of whatever character or description she, r her executors, administrators, heirs and assigns had then or hereafter, could, should or might have, it being the intention of he agreement of said Harriett, "if herein contained," "or even if hey are not particularly specified herein," to accept the sum of ten

thousand five hundred dollars from said Joel, "in lieu and stead and in full satisfaction of all her marital claims either against said Joel Noah and his heirs, or against the estate of said Joel Noah."

In all the arrangements appertaining to this agreement Mrs. Noah was counseled by an attorney of ability, experience and good professional repute, who received the sum of five hundred dollars for his services, and who acted for her in the legal matters, and witnessed the articles of separation and acknowledged the instrument as such witness to her signature.

From the time of the execution of this agreement neither party molested the other, were as strangers to each other to the time of his death, and the widow did not attend the funeral, although knowing from the newspapers when it would take place.

Mrs. Noah's construction of this contract, as evidenced, by her conduct, would seem to be opposed to her present attitude as an applicant for an allowance out of his estate and a homestead.

These articles of separation are fair on their face, and are carefully drawn; from the testimony of the applicant, she appears to have acted in freedom from duress of any sort; she was not under the immediate corporal dominion of her husband; she had already voluntarily separated from him; she had good legal counsel; she received a large share, a good proportion of his separate property—ten thousand dollars in money—leaving for distribution about twenty-five thousand dollars. All the surrounding circumstances show that, when the contract was executed, the parties stood on equal terms.

Deeds for the separation of husband and wife are valid and effectual, both at law and in equity, providing their object be actual and immediate, and not a contingent or future separation: Hutton v. Duey, 3 Barr., 104, cited in Dillinger's Appeal, 35 Pa. St., 362. The arrangement contemplating an immediate separation, having been carried into effect in good faith by the husband, there being nothing unreasonable in it, the wife, after the death of the husband, is not entitled to the aid of the court in any attempt to violate it. In effect and substance, the articles were a solemn and legal renunciation of dower in the husband's estate, and of all interests that may arise under existing or future statutes; therefore, she has no right to claim in character of his widow; it is against equity and conscience to set up such a claim. This was the language of Mr. Justice Woodward in Dillinger's Appeal, 35 Pa. St., 363, who rested his judgment altogether on the articles of separation, which he held to be conclusive against all the pretensions of the applicant; and I think his views fairly applicable to this case. The agreement made by Harriett T. Noah with Joel Noah is a waiver of every right the wife could have in or to the estate; it estops her from claim to probate homestead, as well as to every other property right. There can be no question that such was the intent, and such is the legal effect of the instrument: 2 Met., 46.

There were *no children* from this marriage, and any homestead or allowance that might be set apart by this court would be for the

widow's sole use, and may, therefore, be treated
ilege, which she can, if she choose, relinquish.
any children, interests other than the widow's
vened, and a different question been thus present
tion: Est. Moore, 57 Cal., 437; Phelps v. Ph
Boinan v. Gauch, 85 Ill., 368.

If this view of the court be correct it might see
consider the other questions raised here; but in ca
of the court, as to the contract, should not be sus
it may be proper to pass upon all the points.

As to the application for a homestead, it is
counsel for the executors and heirs, that there is
this estate upon which the homestead character m

Paragraph 6, of applicant's petition, alleges th
the land described, a dwelling house; but there i
support of this averment; on the contrary, it is sh
have been used wholly for business purposes, and
domestic uses.

The object of the law, creating a homestead,
character, and should be held to apply fairly to all
within the equity and spirit of the act, but, beyond
not go: True v. Est. Morrill, 28 Verm., 674. W
speaks of the head of a family, occupying a place
it no doubt refers to personal occupation, and not
Verm., 675.

"The right to a homestead, is a right bestowed b
of the law of this state for the benefit of the fam
Myrick in Est. Moore, 57 Cal., 442; who further sa
"The homestead, when set apart, is to be set apart
the widow and children; every minor child has an
a right to be named in the decree; the property se
home for them all, the widow taking her place as
family; the *status* of the widow, at the time of the
be considered by the court."

"The estate of homestead is one of a peculiar n
vision by the humanity of the law for a residence
his family:" Bates v. Bates, 97 Mass., 395, quot
57 Cal., 444.

In this case, if the applicant be in a position t
court should favor her application, the property, i
of division, must be sold, and proceeds, to the am
sand dollars, set apart for her use. This property
ate property of the decedent, could be set apart
limited period, the title vesting in the heirs subject
the court: Section 1,468, code of civil procedu
Rep., 130. In which case, it is pertinently ask
would the heirs have for the return of the amount,
tion of the period limited?

It is contended strenuously here, on the part of the applicant, that there is a distinction between the character of property that may be set apart by the court as a "probate" homestead, and that described in the civil code, sections 1,237, *et seq.*; but this question is yet to be determined definitely by the court of last resort, the issue not yet having been squarely presented to that tribunal, under the law as it now stands.

Mr. Horace G. Platt (who is one of the counsel in this matter, representing an heir), in his work on the Property Rights of Married Women under our codes, lays down the proposition, as the result of the decisions, that a probate homestead cannot be set apart out of property that could not have been dedicated as a homestead by the parties while living; and, while there is some obscurity in the cases, caused by the absence of direct adjudication in a controverted matter, upon the whole, the dogma defined by Mr. Platt should seem to be well-based.

Intended use, adaptation for use, and actual residence are essentials of the statutory homestead, civil code, 1,237, 1,263; and section 1,465, code of civil procedure, says, if there be no homestead of that kind, "the court must select, designate and set apart, and cause to be recorded for the use of the surviving husband or wife and minor children, or if there be no surviving husband or wife, then for the use of the minor children," etc.; and it is claimed that this language clearly implies that it was the legislative intent that the probate homestead should be set apart to be used as a *home* and not to be devoted to such purposes as is the property here in question. "The probate act was intended to operate in aid of the homestead act, and not in opposition to it—to follow, and not lead:" Est. Wixom, 35 Cal., 323–4. For the reasons stated and suggested, this court is of opinion that, if the applicant had any *status* here, her application should be denied.

Has Harriett T. Noah *status* to make application?

The right of a widow to have an allowance (or homestead) out of the estate, may very properly be tested by reference to her relations with deceased, and her right, as wife, to call on him for her maintenance during his lifetime. This right is founded upon the statute alone. The allowance is made to the *family*. Who are intended, by the statute, to be included in the family? The statute was intended to embrace those who were the *immediate* family of the deceased; those who were, by law, entitled, up to his death, to look to him for support and protection. This would include the wife, minor children, and, perhaps, in exceptional cases, helpless parents and other relatives; yet any person, to be entitled to an allowance out of the estate, must have been in the receipt, or in law entitled to demand, of deceased, a maintenance before his death: Est. Byrne, Myr., 1; Thompson on Homesteads, sec. 914, p. 726.

Eight years prior to his death, Harriett T. Noah voluntarily separated from her husband, after five weeks of cohabitation, and never,

therafter, did she communicate with him, or make any claim upon him for maintenance, the ten thousand dollars paid by him being accepted and acted upon during his lifetime as an acquittance of his spousal liability. At the time of decedent's death she was not in a position to invoke the bounty of the law, having, by her own act, abdicated her right as a surviving spouse, and being in no sense a member of decedent's family. Her application, in this behalf, is not in order; because when the spouses separated, under the circumstances related in the evidence of the applicant, the family was then destroyed, and applicant has not shown she was a member of the family at the time of decedent's death: Thompson on Homesteads, sec. 914.

I am of opinion (1) that the "contract of separation," between Joel Noah and Harriett T. Noah, operated as a waiver of all rights and expectancies of Harriett, including "homestead" rights to be asserted against his estate, which was clearly within the intention of the parties; (2) if this be not so, there is no property out of which a homestead may be set apart; and (3) the applicant has no status to apply for an allowance.

Applications denied.

[SUPPLEMENT.*]

SUPERIOR COURT, COUNTY OF SONOMA, CALIFORNIA.

COLTON *v.* STANFORD ET AL.

G. Frank Smith, Stanly, Stoney & Hayes, D. M. Delmas and *W. T. Wallace,* for the plaintiff.

S. W. Sanderson, Creed Haymond, McAllister & Bergin, Garber, Thornton & Bishop, J. P. Hoge and *L. D. McKisick,* for the defendants.

TEMPLE, J. This action is brought to rescind a contract made by the plaintiff as executrix and general legatee of David D. Colton, with the individual defendants, August 27, 1879.

This was a settlement made by such defendants, acting for various corporations in which Colton had been a stockholder, and had held various official positions, with the estate of Colton. It was also an agreement by which such defendants acquired from the plaintiff certain stocks and bonds.

It is here charged that this contract was obtained from her by fraud, both actual and constructive, through misrepresentations, concealment, undue influence, and under mistake both of law and fact.

The pleadings are voluminous, and present many issues of fact. It has been necessary to investigate in great detail the affairs of numerous corporations having large properties widely scattered, and in general, all the important transactions of the defendants and their associates for many years.

Whenever an issue of fraud is on trial wide latitude is necessarily allowed, for such charges are largely proven by inference. The door for the admission of testimony was still more widely opened here, for the plaintiff was allowed to show the relations which had existed between her husband and the individual defendants by evidence of the manner in which they transacted their business and how they had built up and managed their many railroads and other properties.

In the difficult task of sifting this immense mass of evidence and arriving at correct conclusions from it, my sense of responsibility is greatly lessened by the conviction that in this particular case it is easy for either party to have every issue of fact and law fully con-

[*This opinion was published in No. 14, Vol. 7, of the West Coast Reporter. The copy was furnished us on short notice and without proper revision, and contained a number of errors for which the West Coast Reporter is not responsible. We, however, deem it advisable to supply our subscribers with the opinion revised and corrected. As we have since determined to add to the Reporter the feature of occasional inferior court decisions (as supplemental and additional matter) such decisions will pass through the hands of the editor in the regular manner, and will be published with the same degree of correctness as attained by the Reporter in the publishing of the decisions of the Supreme and Federal courts. —PUBLISHERS.]

sidered by a higher tribunal with every advantage possessed by the trial court. For, vast as is the volume of testimony, and numerous and complicated as the issues are, and widely as counsel differ as to the effect of the testimony, there is no substantial conflict in it.

The first question naturally is, what issues are presented by the pleadings? The complaint commences with the averment that long prior to October, 1871, the individual defendants, and Mark Hopkins, had been associated, and were carrying on business together as copartners, as common carriers, in constructing, leasing, equipping and operating railroads and steam vessels; owning and operating coal mines and furnishing railroads and steam vessels with supplies; and various other enterprises. That the business was carried on by means of various corporations, organized by them, as deemed requisite from time to time, or of which they obtained the control, and in each and all of which they owned and held either the entire, or a large majority of the stock, and were the directors, or had these positions filled by their servants, selected by them for that purpose. That, in consequence of the use of these corporate agencies, and their manner of doing business, they had no firm name or partnership capital stock, designated as such, but the different branches of their business were carried on in the names of the respective corporations used by them, and the individual interests of the copartners were measured by the amount of stock held by each of them in the respective corporations, and the profits paid and divided to each partner were paid as dividends on the shares of stock held by each, and by way of salaries paid them as officers of the corporations.

That, on the fifth day of October, 1874, owing to the increase of their business, they desired another partner, and so agreed with Colton that he should be a member of the partnership, and be associated with them as they had before been associated with each other; and to effectuate and carry into operation that agreement, they executed an agreement in writing, (Exhibit A,) and Colton gave his note as provided in the agreement.

From that time, the parties became partners, carrying on business together through the same and similar agencies as previously by the others; and, during that time, Colton put in large sums of money, and devoted the entire of his time, skill and ability thereto.

Hopkins died March 29, 1878, and the survivors carried on business after his death as before.

That while they so carried on business together they assumed and sustained relations of peculiar and intimate personal trust and confidence, each toward the others, and to the business, and had confidential information and control, each over the affairs, business and property of the others connected with such business; and a warm personal friendship existed between them.

The complaint then proceeds to complete the charge of fraud, duress and undue influence against the defendants, but there are no other facts alleged from which it could be claimed that the relation of the parties was fiduciary. This is important, for the chief com-

plaint is, that defendant owed to plaintiff certain duties as trustees, which in the negotiations and compromise, they violated or failed to perform, and that they took advantage of the relation to extort unfair terms from her.

It is claimed by the defendants' counsel, that the only relation alleged is that of partnership, and that we cannot consider under these allegations any other relation of trust, although the evidence properly admitted on other grounds would be sufficient to establish such relation.

It is further contended that the partnership relation not being proved in this case, and no other fiduciary relation averred, the impeached transaction must be regarded as one between strangers.

I do not so understand the rules of pleading. The plaintiff is required to state the facts which constitute his cause of action. If the facts thus stated entitle him to the relief demanded, he will, upon due proof, recover, although he may have in some respects misapprehended the legal effect of such facts. And it seems of little consequence if, having stated facts which show a fiduciary relation, he has misnamed that relation.

The plaintiff here has set out generally the business carried on and the mode of conducting it, the preceding contract to give their services, and the mode of dividing the profits. Evidently from these facts the court will infer the relations of the parties. And these material matters being stated, it is difficult to see how defendants could have been misled.

It is also averred in the complaint, that, it having been agreed that Colton should become a partner, to effectuate and carry out that agreement, Exhibit A was executed, and Colton gave his note, etc. It is now contended that we must look to this contract, Exhibit A, alone, to determine the relations which existed between the parties to it. Turning to that contract we find that by it, the individual defendants and Mark Hopkins, sold to Colton certain stock, and that Colton agreed to give his services in the business and management of the business interest, of such corporations, as all should be interested in, and to assume certain liabilities.

It seems very singular, to begin with, for A to contract with B that he will serve C, and at a fixed compensation, without reference to the wishes of C. When we look clearly at this agreement, or rather, when we seat ourselves in their seats and take the contract by its four corners, and read it, we find that the parties did not intend to become the mere employees of certain corporations. It was really intended as an agreement to stand in together, and control such corporations, in the personal interest of the parties to the agreement.

The contract does not specify the services, and evidently they were to serve each other, and in such manner and in pursuance of such policy as they should agree upon, from time to time, among themselves. The entire understanding was not reduced to writing,

and we do not allow plaintiff to add to or vary the terms of the writing when we admit proof of their actual relations.

The same method of reasoning, which shows the fallacy of plaintiff's claim, that the only trust relation averred is a partnership, will dispose of the claim that no fraud is alleged except actual fraud, and, therefore, she can base no claim for relief upon proof of constructive fraud. Here, too, the essential matters are the facts, and if she has alleged more than she has proven, she still must have her decree, if the facts, which are averred and proven, entitle her to it.

If these amount to constructive fraud, their force is not impaired because of the added circumstances of an actual fraudulent intent which has not been proven. There is much more force, however, in my opinion, in the claim of defendants that many of the charges of fraud upon which plaintiff now seeks to recover are founded upon facts not only not averred or alluded to in the pleadings, but some of them upon facts concerning which no such claim was indicated during this lengthy trial; that really the defendants have not been heard upon some of the issues of fact upon which it is now sought to base a decree againt them; have had no opportunity to explain them, to show that plaintiff knew all about them, or that they had no weight in inducing the contract.

No rule is better established in this State than that a plaintiff claiming relief on the ground of fraud, must specify with some particularity the facts upon which he relies to prove the charge. This rule was happily stated by one of the counsel for plaintiff during the trial:

"Now, the plaintiff, proceeding against the defendants, upon the ground of fraud, either actual or constructive, either willful or legal merely, by this proceeding is compelled, by well understood rules of pleading, to specify in her complaint the particular facts upon which she relies to impeach the transaction for fraud. She is compelled to state accurately, and somewhat minutely, the circumstances of fraud. As your Honor well understands, it would not have been sufficient for the plaintiff to have come into court, and, relying upon fraud, to have merely stated fraud in general terms. She must state it specifically. She must state particular facts. She must state particular relations. She must state particular violations of duty. Then, having done so, the plaintiff has selected her own battle-ground. She has selected her own weapons. The defendants are purely on the defense, and upon the ground thus selected, and with the weapons thus chosen, the battle of fraud or no fraud is to be fought. If the plaintiff fails to prove the specific circumstances of fraud which she has alleged, her case fails. It is of no avail to her that there may be other grounds of fraud; that had she selected other weapons, she might have successfully attacked this transaction. She must stand or fall by the allegations contained in her complaint."

It is true, judgment is sometimes entered upon a state of facts differing from those in the complaint, and the parties are allowed to

amend so that the findings will correspond with the issues made by the pleadings.

If a different version of the transaction is set out in the answer, it may be adopted if it will be sufficient in law to warrant the plaintiff's claim for redress. So, where the allegation sufficiently indicates the transaction and the acts which are said to constitute fraud, but these are inaccurately set out in some of their details. Here, notwithstanding the inaccuracies, the defendants have been made aware as to what they must come prepared with proofs.

So, too, in other cases, however widely the facts may differ in detail, if their general effect is the same, and the court is able to see beyond all question that the defendant has not been misled to his injury, plaintiff may recover. Generally, in this class of cases, the pleadings should be amended before the evidence is closed, but in no case will the court ever found a decree upon the finding of a fact which it cannot plainly see was understood by all parties to be a fact in issue or was admitted. Certainly, it would be most unjust to permit a plaintiff, after the testimony has been closed, without a hint of such a claim, to work out from the evidence entirely different theories from those stated in the complaint as the ground of liability on the part of the defendants. Especially would that course be unjust in a case of this character, where the mass of testimony is so great, and was admitted upon so many issues.

Plaintiff's counsel claim that evidence of other facts is admissible if they tend to establish the plaintiff's right to recover in its general scope and meaning. Of course, if other facts tend to prove the allegations, they are admissible. Otherwise, I do not understand the contention, unless it be meant that evidence will be received if it tends to prove any fraud whatever in the impeached transaction. This would entirely do away with the rule, now well established, that the plaintiff must state the specific facts upon which he relies; must point out the acts which he claims are fraudulent, the duty which has been violated and the particular breach of it. Nay, he may in his complaint state facts which he knows cannot be proven, and upon the trial may rely upon a totally different case. The fact that as a rule of evidence the burden of proving fair dealing is on the defendant does not affect the rule of pleading. It rather increases the necessity of having the breach of duty upon which the plaintiff relies specifically pointed out. Perhaps the ingenuity of counsel may now discover in this record many facts which it was material for plaintiff to know, and which it is not proven she did know. It would be hard measure for a defendant to be required, on the argument, for the first time to show that he disclosed facts concerning which at the trial there was no alleged dereliction and no hint of materiality or ignorance.

There never was a case, there could hardly arise one, where the rule would work more harshly than in this very case. Take for instance, the matter of the dividend of the Western Development Company.

The complaint charges defendants with falsely representing this corporation as insolvent, that a certain stock and bond dividend had been improperly declared, and would be revoked to enable the company to pay its debts; that defendants would return their dividends, and plaintiff would be required to do so.

The answer avers that the dividend was improperly declared, there being no surplus on hand to divide; that finding it had been done by Colton, defendants insisted that the resolution should be revoked, but finally consented that it might stand, under promise of each to the others, that in case any or all of the bonds should be required by the company, they would return them. I have been unable to find, after considerable search in this immense record, that anything was said by counsel or witness which would indicate that plaintiff claimed that this agreement would show the existence of fiduciary relations, much less that any claim to relief was based upon a failure to communicate the fact of this agreement to plaintiff. I am convinced that during this long, wearisome trial, no word was uttered by way of complaint that either Wilson or plaintiff were ignorant of it. Plaintiff, when on the stand, was asked a great many questions which, with the answers, fill many printed pages, whether she knew this thing or the other, before she signed the contract.

Naturally, counsel would expect to find here, what she claimed to be fraudulent concealments, especially if there were any such matters, not stated in her complaint. I do not find this matter there alluded to. It seems plain that, until the evidence was closed, defendants' attorneys did not suspect, and had no reason to suspect, that any importance was attached to the question as to whether this fact had been disclosed. On the argument, however, plaintiff's counsel insist and urge with great force that the failure to communicate this fact was such a breach of duty as of itself should compel the court to decree for plaintiff.

The case is all the worse from the fact that no one could read the evidence, understanding that there was no issue upon this point, and not be satisfied that both Wilson and the plaintiff knew all about it. While, if read with the idea that the matter was in issue, the proof might be insufficient to establish the fact. Certainly, on this issue the defendants have had no day in court.

But it is said the fact is averred in the answer. But the answer contains no statement as to whether plaintiff settled in ignorance of the fact; nor is there anything there, to suggest an issue upon that question.

The matter of the unpaid subscriptions, so far as concealment is concerned, is in the same condition, but I think that evidence admissible on another ground, of which I will presently speak.

As already suggested, there never was, to my knowledge, a case in which justice required the rules of pleading to be more strictly enforced. In few cases, if in any, have there been so many issues of fact, or has there been so much testimony. The door was opened very wide for the admission of evidence. Nearly all the important

transactions of the defendants, and of the corporations which they controlled, became proper subjects of investigation. How few and simple, comparatively, were the issues in the cases cited here by plaintiff as authority for the court, to disregard the pleadings and enter the judgment, which the evidence may warrant, upon any possible theory of facts, which the ingenuity of counsel may devise.

In Place v. Minster, 65 N. Y., there was a variance as to the details of a conspiracy. It turned out that a sale was made to one Sherlock, who was to convey to defendants, instead of to L. Minster, as alleged. It was not really a variance, even as to the conspiracy, but only as to the details of the plan of carrying it out. It made no difference whether the person selected to pose as an innocent purchaser, was one or the other. It was such an inaccuracy as could not mislead. The facts were few, comparatively. Such was the case in the other authorities. The court would easily see whether the parties had really tried the issues upon which the judgment was finally based. Here the evidence was admitted as relevant to other issues. The court cannot say that defendants would have had no further proofs had they apprehended the full extent of plaintiff's claims.

I think evidence was admissible as to what are called the omitted assets of the Western Development Company, as the pleadings stand. It is charged that defendants represented that company to be insolvent and unable to pay its debts, without a return of the dividend. This is averred to be a misrepresentation. The evidence was clearly relevant. This is a distinct issue from the charge of concealment, and from the charge that Exhibit E was presented as a perfect inventory and appraisement of all the assets of that company, and that plaintiff thereupon compromised, supposing that she knew what property she was selling. Treated as a concealment or a misrepresentation as to what the assets consisted of, it was incumbent upon the plaintiff to specify. But the question of solvency was a different issue, and moreover was, in my opinion, one of the very important questions of fact in the case. The fact that this evidence was properly admitted for other purposes, cannot, however, enlarge the scope of the averments in the complaint, and the proofs must be considered solely in reference to the issues there made or tendered.

After stating facts calculated to show the relation of the parties and the character of the business in which they were engaged, the complaint proceeds to charge various misrepresentations made to deceive and defraud the plaintiff.

First—Colton was indebted to the Rocky Mountain Coal & Iron Company in the sum of one hundred and eighty-one thousand eight hundred and two dollars and ninety-nine cents, for money fraudulently appropriated and embezzled.

Second—He was indebted to the Western Development Company in the sum of twenty-six thousand six hundred and eighty-six dollars and twelve cents, for money fraudulently appropriated.

Third—That the Western Development Company was insolvent and unable to pay its debts.

Fourth—That Colton had caused the Western Development Company to improperly declare a stock and bond dividend without the knowledge of defendants, and that it was necessary to recall this dividend to pay the debts of the corporation, and that the defendants would return theirs.

Fifth—That four hundred and eight shares of the stock of the R. M. C. & I. Company in her possession did not belong to the estate of Colton, but were held in trust for defendants and Mark Hopkins' estate, and upon their paying the cost price they were entitled to an assignment of such stock.

Sixth—That the value of the stock and bonds received by her from her husband's estate and the stock pledged to pay Colton's note for one million dollars was insufficient to pay Colton's indebtedness to the R. M. C. & I. Company, and his share of the indebtedness of the W. D. Company, and his indebtedness to themselves and the estate of Mark Hopkins.

Seventh—That Colton had commenced robbing them from the first day he was connected with them.

Eighth—They presented Exhibit D, as marked in the complaint, as a true statement of Colton's liability to the corporations named for such misappropriations.

Ninth—They presented a statement, marked in the complaint as Exhibit E, as a true statement and account of the assets and liabilities of the Western Development Company.

Tenth—That the values set opposite to the various properties or assets in Exhibit E were the true values of each item of such assets respectively; and

Eleventh—That it was necessary to, and they intended to, and would forthwith cause to be levied upon the capital stock of the Western Development Company an assessment of many millions of dollars.

Then follow allegations of threats, to wit:

That they would attack the reputation of her husband and blast his memory unless she complied with their demands and gave up certain bonds and stock and paid certain alleged indebtedness; that they would stop all future interest on the bonds, and would prevent their sale by her, and take forcible possession of them; that they would take her home from her and all she possessed by legal process, in satisfaction of the indebtedness, unless she assigned all the stock and bonds received from her husband's estate to them.

Of course, the necessary allegations as to her ignorance of the real facts and her reliance upon the representations follow; but these matters constitute the gravamen of the complaint and all the specific charges made, unless, inferentially, others are made in the recitals of facts, alleged to have been discovered by her since she executed the impeached agreement. She avers that she has discovered since the agreement, that by it they obtained great and unconscionable

advantage over her, and that the agreement was unjust and unfair; that she had discovered the following facts, of which she was ignorant at the time she signed the contract:

First—That the million-dollar note was entitled to a credit of two hundred and fifty thousand dollars, and that all interest on the same had been paid.

Second—That the Western Development Company had divided twenty-one millions or thereabouts in dividends, and had on hand at the time of Colton's death property worth twenty millions, subject to an indebtedness of eleven millions three hundred and sixteen thousand four hundred and ninety-seven dollars and twenty-two cents.

Third—That immediately after the death of Colton, the Pacific Improvement Company was formed by the defendants for the express purpose of superseding the Western Development Company, and which, since the assignment to it of the contracts, etc., of that company, has earned twenty millions of dollars, or thereabouts, from the business diverted from the Western Development Company by the defendants. By these acts the defendants sought to deprive the partnership of such earnings and to depreciate the assets of the corporation, and so to embarrass the plaintiff and defraud her.

Fourth—That the Western Development Company was never insolvent, but had always been prosperous.

Fifth—That her stocks and bonds were of greater value than defendants had represented, and that defendants had always known their representations to be false. They had been appraised much higher in the Hopkins estate, in which appraisal the defendants had been consulted. This inventory had been retained by the defendants, and she was not allowed to consult it.

Sixth—That Colton did not hold the four hundred and eight shares of R. M. C. & I. Co.'s stock in trust for the defendants and Mark Hopkins, but that stock belonged wholly to Colton, and was worth forty thousand and eight hundred dollars.

Seventh—That Colton was not indebted at all to the R. M. C. & I. Co. or to the W. D. Co., as defendants had charged, and had not appropriated any money from either corporation, and such charges were created after Colton's death, to coerce her into executing the contract.

Eighth—The exhibits of the condition of the Western Development Company were false and untrue, and the property undervalued by the direction of the defendants, to deceive the plaintiff as to the true condition of her husband's affairs. These alleged misrepresentations, threats and discoveries contain all the charges against the defendants, and upon such of these as appear to be established she must recover, if at all.

Appended to the complaint are Exhibits D and E. D contains a list of the misappropriations or indebtedness charged against Colton in favor of the Rocky Mountain Coal and Iron Company and the Western Development Company. E is a list of the assets of the Western Development Company, with values appended to each item.

Limiting our inquiries to the issues made in the pleadings, or at least to such as both parties understood, or ought to have understood, to be made the inquiry which naturally suggests itself first is: What relation did the parties to the assailed contract bear to each other at the time it was executed? Were the individual defendants the trustees of the plaintiff, and were they charged with certain duties to her in those transactions which prevented their dealings as strangers, and the non-performance of which would render the contract void at her option? It seems to me quite obvious, to begin with, that the relations between Colton and his associates in regard to the various enterprises inaugurated and carried on by them in pursuance, necessarily, of agreed plans, and for definite purposes, were to some extent fiduciary.

A business association can hardly be imagined, the purpose and character of which, and the mode of carrying on which, implied and necessitated a greater degree of actual confidence than that which existed between Colton and the individual defendants. Certainly Exhibit A does not state fully the purposes of the contract then made, nor the character of the services the parties to it were expected to render. They agreed with each other that they would all serve certain corporations; but they did much more, and much more must have been definitely understood by the parties when they executed that contract. Why should they contract with each other that all should serve certain corporations? How could they become employees, unless the corporations would employ them, or how could these individuals contract for the corporations as to the salaries to be paid? Evidently they had agreed to co-operate with each other in acquiring the control of the corporations, and they agreed to co-operate afterwards in their management. This implied accord, consultation, agreement in an object to be accomplished, working with and for each other. There was, to some extent, mutual employment, mutual agency. Perhaps there was no very definite plan agreed upon in all its details; but there were evidently contemplated, a system of roads for the Pacific coast and such transcontinental lines as they might be able to control. In detail they must have been indefinite, subject to frequent change and adjustment, as all should agree from time to time.

At first, of course, the Central Pacific and the Southern Pacific were matters of chief interest, and perhaps, have continued to be. Still, they are but parts of a system of roads which they contemplated and have built and controlled. Their projects have probably grown with their enterprises and been frequently changed. Necessarily they have been in constant consultation, and as each new scheme was determined upon, each seems to have had his part in the work, though apparently as each enterprise was inaugurated each party then decided for himself whether he would go into it. There seems to have been no power in the majority to commit any one to a project until he had approved it. The rule was as laid down in one of the letters, "in what we do we should all agree."

They, therefore, must have had at the time the contract was signed on October 5, 1874, some general idea of the enterprise they were embarking in, and each did embark in the enterprise in the belief of the willingness of the others, and in confidence of the integrity and fidelity of each. The advantage gained or sought was co-operation, and the essence of the contract and of the relation was confidence and reliance upon each other; thus filling the very definition of a trust. They formally agreed to give their services to certain corporations, but they evidently meant that they should assist each other in controlling and managing the corporations in such manner as would make the corporations serve themselves. And they evidently had plans beyond the scope of existing corporations, and when they agreed to serve certain corporations, named and unnamed, they also intended to create such new corporations as, in the course of events, they should find necessary or deem advisable to the realization of the larger scheme which transcended all the corporations. The contract really meant that all should assist in these designs. As directors or employees of the corporations named in Exhibit A, they could not organize other corporations.

The Western Development Company owned all the stock in various other corporations, but none of these other corporations were or could have been organized through its corporate action, or by its stockholders acting as such. The parties, therefore, evidently intended to secure the co-operation of all in matters entirely beyond the province of any corporation. They agreed in effect to consult and conjointly to organize new corporations and to inaugurate new enterprises as they should all agree. It is not of consequence whether such an agreement could have been enforced. They voluntarily acted upon it, and we are now concerned with the consequent relations. In the management of the completed roads, also, it was evidently intended that the services to be rendered each particular corporation should be different from those of a mere employee of that corporation.

The branch roads were to be run—and it will be seen, or may be, from this evidence, that leases of these were made and rentals fixed—entirely in reference to other matters than the value of the use of the road to either of the parties to the lease. Thus one short road which only earns during the year the gross sum of about ten thousand dollars, at an expense of seventeen thousand dollars, is leased to the Central for twenty-five thousand dollars, to enable it to pay interest on its bonded indebtedness. The character of the Western Development Company—the first corporation organized after Colton joined the defendants, and which was formed because of his accession, and took the place of the Contract and Finance Company—further illustrates the relation of these parties. It was incorporated in December, 1874, for the declared purpose "of carrying on the construction, manufacturing, mining, mercantile, mechanical, banking and commercial business in all its branches, receiving deposits of money and loaning the same; purchasing, holding and owning real property, improving and selling the same; the

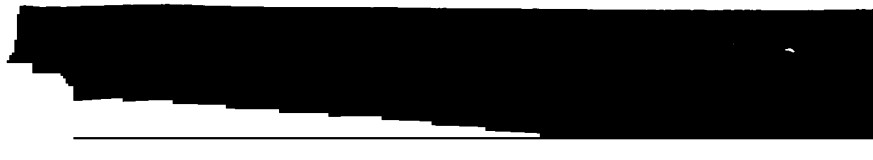
construction, leasing and operating all kinds of public and private improvements, such as railroads, wagon roads, bridges, ferries, wharves, shutes, piers, telegraph lines, canals, ditches for drainage, agricultural, mining, navigation or other purposes; buying and selling and constructing all kinds of public and private dwellings; buying and selling and dealing in all kinds of public and private stocks, bonds and securities."

The range of powers in this corporation seems to have been made as large as possible, that it might become, as near as a corporate body could, the universal factor of the parties associated by the agreement of October, A. D. 1874. It does not represent by any means all that that association evidently intended, but it shows the great variety of enterprises they then thought it possible they might engage in; and that co-operation, in enterprises or speculations, was the one distinctly understood purpose of that association.

But, as it is claimed that this corporation was itself a partnership, masquerading under a corporate mask, or if not a partnership, it was of such a character as at least would, and did, of itself, constitute the stockholders trustees for each other, we will examine it a little more closely. It was a close corporation, having fifty thousand shares of stock of the nominal value of one hundred dollars each. No assessment was ever made on the stock, nor was any contemplated as probable. The capital required was agreed to be furnished by the associates, in proportion to their stock, by deposits made with the company.

Each party seemed to have the power to withdraw the deposits to some extent, as his necessities would require, and it evidently was not expected that the deposits should be kept equal; for interest was allowed by the company upon deposits for the purpose of compensating any inequality which might exist in the amounts. Nevertheless, it certainly must have been intended, and the parties certainly must have understood, that each was under some obligation to contribute about his share. It was probably expected that they would not be very exacting, but yet there could hardly have been an agreement that any one could be at liberty to contribute nothing, or very little, while the others were giving all. They needed money. It seems always to have been the important question with them: How could they get enough for their necessities? And I find nothing in the evidence or in the circumstances of the parties to warrant the inference of an agreement, express or implied, that in no event would there ever be an assessment. Had either one failed to contribute, I see nothing to have prevented the others from enforcing the contribution by a call.

Ten thousand shares were issued to each of the other parties, but none to Colton; but the other ten thousand shares were issued to one of the nominal corporators, an employee of the company, by him endorsed in blank and left with the secretary. Colton, however, entered at once in the employment of the company, became, in fact, its chief manager, and acted in all respects as though it was



one of the corporations in which all were interested and contemplated by the contract in Exhibit A.

In October, 1876, in pursuance of a provision in the original contract of October, 1874, the others gave Colton notice of rescission of that contract. The consequence seems to have been, not that Colton then withdrew from the railroad business, but that soon after he paid near fifty thousand dollars to S. H. H. & C. for an interest in the Western Development Company; that five thousand five hundred and fifty-five and five-ninths shares of the ten thousand shares practically then unissued were issued to him, and the remainder to S. H. H. & C.; that Colton deposited over three hundred thousand dollars with the company, and the contract, Exhibit A, was executed and dated back to October, 1874, to take the place of the original contract, which had reserved the power to the other parties to rescind. This transaction made Colton the owner of one-ninth of the stock of the W. D. Company, while each of the other parties had two-ninths.

It is, perhaps, of no great consequence in this case, but one can hardly resist the impression that it was at first intended that Colton should have an equal share with the others, but that he was not able to contribute his proportion, and that the notice to rescind was given in consequence of this failure, and the final arrangement was the compromise made.

At all events, the corporation continued to be, as it had been, the almost universal agent of the associates in the accomplishment of the schemes which I think were contemplated when the parties first contracted for the co-operation of each other in the contract, Exhibit A.

It has built many railroads, steam vessels, fences and bridges, repaired wharves, docks and steamboats—in fact, done everything in the way of construction, repairing or furnishing that their extensive business has required. It has had surveys made where it was constructing no roads. It has, in fact, furthered the designs of the associates before they had found expression in any corporate organization or any contract with the company. The new companies were frequently, or at least sometimes, formed by the employees of the W. D. Co., posing as corporators, and then as directors. The new company then contracting with its virtual creator to build and furnish its road for all its stock and a certain amount of bonds per mile; the working capital was furnished by deposits made by the corporators as before mentioned. These constituted the working capital, but always appeared on the books of the company as indebtedness due the depositors.

Thus, when Exhibit E was made out, it showed an indebtedness as follows:

To estate Mark Hopkins	$4,087,692 10
To Charles Crocker	2,219,541 79
To Leland Stanford	1,763,734 85
To C. P. Huntington	3,519,701 42
To estate Colton	319,860 33
To S. H. H. & C	298,208 35

But while the Western Development Company seems to have been gotten up to carry out and realize the projects for which the parties associated themselves by Exhibit A, and while it was managed almost like a partnership, to accomplish their common purposes and to serve their personal ends, it nevertheless was a corporation and transacted its business as a corporation, going through with all the corporate forms. The officers were the mere employees of the associates (a term which I use for convenience, meaning only the parties to contract Exhibit A), and implicitly obeyed the directions of either one of them. But such directions were generally, where necessary, reduced to the form of corporate resolutions. The contracts under which they have performed such an amount of labor and secured so many millions of assets were with their own creatures, or, at least, with corporations practically belonging to them. The contracts were of course all voidable, at the option of either party to them, only neither party had voice or volition against the associates. It may be said that in effect these associates organized corporations and built railways, taking, as they had a right to do, all the stock and such amount of bonds as they saw fit to encumber their property with. Perhaps, in a proper case—that is, where it was necessary to do justice—the court would disregard these corporate forms, and, reaching beyond them, grasp the substance and treat them as partners.

If it were necessary to enforce some contract in relation to these matters made between themselves, perhaps the court would do so. But often, perhaps generally, forms are made to secure rights. Are these corporations here mere forms, or do they and were they intended to constitute and show the relations of these parties to each other? The law of the state authorizes corporations for any purpose for which men may lawfully associate themselves. There is, then, no business which it is possible for a copartnership to conduct which may not be carried on by a corporation. I see no reason why, when persons have determined to embark in any kind of business together, they may not determine for themselves whether they will do so as partners or as stockholders in a corporation. And if they have so chosen, I do not comprehend how the court can disregard the relation they have contracted and force upon them those they have declined to enter into. The cases cited fall far short of the exigencies of the plaintiff's case in this respect. In both of the cases cited from this State there was an antecedent agreement, to carry out which, in part, the corporation was formed. The parties to the agreement were the only stockholders; some one of the contracting parties attempted to avoid liability, or defeat the contract, on the ground that the corporation they had created as an instrument to carry into effect this very agreement had become a third party not bound by the agreement as not a party to it.

The court, in effect, said: Justice shall not be defeated by this merely formal thing. It really only represents yourselves. We will look behind the form to the substance. The contract shall not

be defeated by this mere technicality. The case of Shorb v. Baudry hardly amounted to this. There the corporation was, and was created only, to act as a naked trustee of the legal title, the beneficial interest being all the time in the partnership, and it would seem that whole matter might have been settled without the comments made. Here there is no question of an antecedent contract, with the enforcement of which the corporate entity stands in the way. It is not an obstruction which can embarrass the court in granting relief, which, but for such technicality, the party would be entitled to. The corporate form is to be made to vanish from sight to show what the rights of the parties are, or rather to fix upon the defendants obligations which they deliberately declined to assume, and not because they stand in the way or obstruct the court in ascertaining and securing the rights of the parties. All the parties were evidently unwilling to assume towards each other the relation of partners. The law offered them the choice to become stockholders in a corporation, and they deliberately contracted that relation. The same business could have been carried on in either form, and, if the corporation were a close corporation, in pretty much the same manner, except as to the authority of the managers; but this makes all the difference in the world as to the relation of the parties.

But one position of the plaintiff is, admitting that these are all corporations and are to be treated as such, still they are but the instrumentalities of a copartnership, which was created by the association of Colton with the defendants and Mark Hopkins. The individuals were partners, and, in consequence of the corporate agencies used by them, they had no firm name, or partnership capital designated as such, and the individual interests of the partners were measured by the stock held by each in their respective corporations, and the profits of the partnership were paid by way of dividends on the shares of stock in the various corporations held by each respectively. I see no mention of business in the complaint carried on by these parties except corporate business. Regarding these companies as corporate entities, it is difficult to see how there can be any other relation between the parties, so far as the business of each corporation is concerned, than that of co-stockholders.

I am not now saying that, taking the entire group of companies together, there may not have been here some sort of fiduciary relation; but, speaking now of the definite relation of copartnership, I ask what business did the copartnership carry on? The complaint answers, that of common carriers; but this we find entirely in the hands of these corporate instrumentalities which entirely manage it, and are fully adequate to the occasion, without the partnership. What is the business beyond the scope of the business of the corporations in which they become mere instrumentalities? Bring us the books of this larger business and show us its profits. What is there earned which is not corporate property? By averment, all

the profits are corporate profits, and are divided among the stockholders as the profits of other corporations are divided.

I can understand how a corporation may be made an instrumentality of a partnership. These railroad companies are used as instrumentalities by many partnerships. But I cannot comprehend a partnership which has no firm name, no capital stock, no business, and earns no profits and incurs no loss. Take the case of loss. How can there be a partnership loss? These profits are as stockholders, and their losses would be of the same character. What liabilities do they incur except as stockholders? The fact that they have sometimes borrowed money on their individual notes for the corporation would not affect this question. Any stockholder may do that. And will it be contended that if the majority holders of stock consult as to the policy of the corporation, and agree together to enforce such policy, that they thereby become partners? I can see no reason why the averments of the complaint, as to the mode of conducting this alleged copartnership and the division of profits would not fit any case where there is such consultation, as well as this. It seems to me this is a misuse of the term instrumentality. The proper object of such corporation is to make money for its stockholders, through corporate business, as other corporations do. To say that the associates use these corporations only for that purpose is to say that they are acting only as stockholders. A corporation must be made to serve some other business to constitute it an instrumentality in the sense in which the word is used in the complaint. I have not the faculty to grasp the idea of a partnership whose business consists in controlling a number of corporations for the purpose simply of enabling the corporations to make money for their stockholders in the legitimate business for which they were respectively incorporated. Fiduciary relations may exist between stockholders of various corporations who have associated themselves to control such corporations and make them work in harmony; but they would not be partners.

And so I conclude, although the corporations managed by these associates cannot be regarded as partnerships, nor as mere instrumentalities of a partnership, the relation between the parties was nevertheless of a fiduciary character. I think it already appears that the parties to the agreement, Exhibit A, intended something more than to procure situations for each other as employees in various corporations. They had designs not stated in that paper, which were the real purposes of that association. The fiduciary relation must have existed under our code as to these projected enterprises and the management of the system of roads they had built and acquired. The facts at once suggest to our minds the obligations of fidelity due from each to the common enterprise. Neither would have been at liberty to do anything to defeat the objects of the association. Each had invested his money and expended his labor in reliance upon this fidelity of the others.

But if a trust relation of this character existed between these associates, what was the relation of the survivors upon the death of Colton to his representative? At his death the association was entirely ended. It was a case where confidence was given for confidence, service for service. There was no property belonging to the associates as such. No power over the affairs of Mrs. Colton or the estate of D. D. Colton survived his death. His position was one of great power over many things, through this mutual confidence. She was merely a stockholder in various corporations. It is true, they continued to be virtual directors of these corporations, as they and Colton had previously been. But this no longer depended upon any confidential relations with the holders of Colton's stock. There was nothing to prevent Mrs. Colton from engaging in competing business or bind her to their schemes in any other way than any stockholder would be bound by the action of the directors. In other words, they had no other power over her affairs than as directors. The previous relations with Colton did not affect the question. They and Colton had no vested interest in any new projects not yet begun. The association was for the purpose of enriching themselves through the corporations. Whatever they had was held as stockholders. The mere schemes she had no lot in. The association had no property. They had further projects, schemes and designs. There was no succession as to those. The survivors, as virtual directors, owed duties to the corporations. The value of the stock and bonds belonging to some of these corporations and to Mrs. Colton individually, depended largely upon the completion of some of these schemes, or at least their partial completion. She could not be called upon to contribute to any of these; nor do I see how she could require them to incur risks and expend their means and energies to that end; at least beyond the performance of contracts which had become obligatory upon some of the corporations they controlled. They were parties to a contract, the sole purpose of which was to secure the united efforts of all in the interest of sundry corporations in which they all had stock. One of them died. Evidently there is no consideration for the further service of the survivors, and no obligation was cast upon them, except such as rests on all directors. Otherwise, it would seem that Colton's estate would be bound for further schemes to advance the system they had partly completed. These Mrs. Colton had distinctly declined to contribute to.

There were not then, after Colton's death, any further active duties as trustees due from defendants to the estate of Colton. They had, however, been associated with him in many important enterprises in which they had practically acquired much valuable property. In this way they may have acquired knowledge as to the value of the property, and they, in fact, had great power over the assets of the estate as virtual directors of these numerous corporations. The association between themselves was kept up, by means of which they continued to direct the policy of all the roads as they and Colton had

previously done. Considering these facts and that the fiduciary relation, such as it was, between the defendants and Colton, had but just been terminated by his death, we approach the question as to what duties the defendants were burdened with in their dealings with the plaintiff, and how they discharged them. It must be remembered here, that it is not claimed that the transaction was had under the influence of any trust relation. The plaintiff did not rely upon the defendants, believing that they were her trustees, and as such, owed her any duties whatever.

She understood that she was dealing with them as strangers, and that she must protect herself. It is claimed that the assailed contract must be set aside because she dealt in ignorance of her rights as the beneficiary of a trust. Her counsel says this voluminous record contains no evidence that she was aware of the fact, or that the defendants ever dreamed that they had no right, legal or moral, to deal with her at arm's length, and as adversaries; and he claims that the concealment from her of the facts constituting the trust relation is one of the most pregnant facts in the case. And beyond all this, Mrs. Colton, as a witness, states that she did not deal or settle with perfect trust and confidence. That, at the time, she saw no justice in the transaction. That her heart rebelled. That she believed the defendants made the charges, knowing them to be false. That they manipulated their books to sustain the charges, and were altogether unworthy of any trust or confidence, and, in effect, she said that she believed the settlement a robbery, which, under the cirumstances, she was powerless to prevent. Of course, this at once takes out of the case all claim that the settlement was brought about by any personal confidence in the defendants. She did not rely upon them.

If this was an issue in the case and there was a presumption against the defendants, and the presumption was a disputable one, it could not be more completely disproved. If the relation between the associates be denominated a partnership, or be considered such, it would not change this result. At Colton's death the relation was dissolved, and there survived to the defendants no power as partners, because there was left in their hands no assets of the firm to be administered. It is, therefore, for the purposes of this case, utterly immaterial whether it be denominated a partnership or not.

The conclusion arrived at, as to the obligations which rested upon the defendants as late partners or trustees of Colton, may depend much upon the construction given to the provisions of the code in relation to trusts. I understand that the death of a partner dissolves the relation, except for the purposes of liquidation and settlement. Perhaps this might involve in some cases performance of incomplete contracts. Now, there never was a time when the death of any one of the partners, if they were partners, would have left to the survivors, property of the partnership or power over the estate of the deceased partner such as goes to a surviving partner. This would go far in my opinion to show that the relation was not that of

partners; but, independently of that, this fact must affect very considerably the relation of the survivors. The surviving partners are trustees with reference to the interest of the deceased in the firm, because the property is left in their hands, and a power with reference to it, survives to them. They have the property and the power, and hence the duties and the correlative rights of the *cestui que trust*. There being here, no property or power as survivors, the relation and duties, it would seem, would also cease; all, anyway, except such as frequently survive the actual relation—the duty of making full disclosure, and to refrain from taking any advantage of the position, to oppress or influence the beneficiary of the late trust.

Plaintiff's counsel, or some of them, contend that the code has made quite a material change in the law of trusts, or at least in the application of the rules heretofore recognized and enforced by courts of equity upon the subject. As I understand, it is contended that whenever circumstances exist which, under our code, would constitute what is there designated the trust relation, the law fixes upon the trustee a definite set of duties, which are the same upon all trustees, or all who, by the code, are declared to be trustees, however various the obligations may be, which the parties have knowingly undertaken, or the character or degree of confidence by which the relation was created. If there is any foundation for this claim, it is a very important question; for it is also contended that all who accept any degree of confidence from another, are trustees within the meaning of the code. That all those who were simply called trustees, in the decisions, by analogy, and because to some extent the law of the trust relation was applied to them, are by our code placed upon the same footing as technical trustees. This will include innumerable cases in which transactions were had, partly in consequence of known reliance of one party upon the other, or upon some statement made in the negotiations. Counsel has cited one instance of the creation of the relation by actual reliance of one party upon the other.

A country dealer goes to a wholesale merchant to purchase goods, and, being asked in regard to his solvency, undertakes to state his financial condition, and at once the wholesale merchant becomes his *cestui que trust;* and, although counsel does not expressly claim this, it would follow from his position that if now the retail merchant purchase, he trades under all the obstructions which are placed upon the dealing of technical trustees with their beneficiaries. He must protect the confiding wholesale dealer from selling too cheap, and if he does not himself know, must be diligent to find out, that he may inform his beneficiary of all matters material to the transaction. He must do more; he must disclose his real motives in seeking to trade, and this includes his future policy in reference to the goods; and if it turns out that he had, or thought he had, some special opportunities of disposing of some of the goods which he did not disclose, the wholesale merchant may, at his option, rescind

the sale or claim an accounting of the profits made, and then the retail merchant is presumed, without proof, to have obtained the goods for an insufficient consideration and by the use of undue influence.

The code, it is said, defines a trust as a relation, and declares that the relation exists whenever one voluntarily accepts the personal confidence of another. The code then defines the obligations of trustees, which it is contended apply in their full length and breadth, and therefore, of course, to all cases alike, to every case in which there is a reposition of confidence of any character or degree. The extent of the supposed change in the application of the law will be better appreciated from the remarks of the late Professor Pomeroy, upon the code provisions in regard to trusts. He says:

"The essential conception of a trust, as a word of legal nomenclature, and as defined by the text writers of the highest authority, assumes not only a confidential relation between two persons, but also some specific thing—land, chattel, money—as the subject matter of such relation and two co-existing estates in the same subject matter, the one legal—held by the trustee, the other equitable—held by the beneficiary. All the constructive rules of law and of equity concerning trusts are based upon these essential elements of the peculiar legal conception, namely, the confidential relation, the subject matter and two co-existing estates therein.

"It is true the term has often been improperly extended by analogy or metaphor to cases where there was only the confidential relation and a subject matter without the two co-existing estates, but it has never been so extended to cases where there was only a confidential relation between two persons. The ablest modern judges—English and American—have endeavored to restrain all such expressions of the term by analogy and to restrict the use of the word to those cases where all of its essential elements were found.

"Nothing more tends to produce confusion and uncertainty in legal rules than the use of fundamental terms in improper senses. The authors of the civil code, in their definition of 'trust,' have totally ignored the essential elements of a subject matter over which the relation extends, and have made it depend alone upon the existence of a confidential relation between two persons." The learned professor then goes on to remark that if the definition be interpreted literally, and if the meaning thus given should be followed to its logical results, the whole grand department of equity relating to trusts must necessarily be modified, if not reconstructed. Indeed, he says, the literal interpretation would make every one who wrongfully takes or converts a chattel, a trustee. Carried to its logical conclusion, this code, if their construction be correct, would leave very few transactions, indeed, unaffected with the trust relation. The least reliance in a negotiation of one party upon any statement or assurance of the other, converts the one into a trustee and the other becomes his beneficiary. The practical effect would be that the obstruction to transactions created by the trust relation would

be extended to all business affairs. Then the difficulties of accomplishing the very transaction which occasioned the confidence would be so great that to make an unassailable contract would be almost impossible. The reliance upon some representation being manifested, the relation is created *eo instante*, and the code has tabulated the duties and obligations of the trustee, which do not spring from the contract nor vary with the nature of the confidence. The best developed and most cultivated moral sense would never suggest the duties which the trustee has assumed. They have no reference or correspondence to the nature or degree of confidence or to what both parties would, in the nature of things, expect. The only material circumstance is a reposition of confidence, no matter what or to what extent, so it be material to the transaction or to the relation of the parties to the subject matter, and in many cases where it is not material in either respect. It is unfortunate if our code has enacted this uniformity of duty and obligations in relations which vary as widely as human transactions can or as can be conceived of. It would be strange if such a law were found upon the statute book of any civilized community. Stranger still, perhaps, that counsel should commend such a standard of conduct as a high one, and protest against any lowering of it. This would be to establish rules governing the ordinary affairs of life above the moral vision of the people. The enlightened conscience of at least the best and most cultivated should be able to discover the duty from the nature of the relation or the transaction; otherwise, the law becomes a trap for the unwary. It would legalize bad faith and encourage a most shameful species of fraud. In this trial I have heard read case after case in which, while the transaction has been successfully impeached, the chancellor takes pains to say that the losing party has been guilty of no wrong. This has struck me as a reason to question the perfection of a jurisprudence where such results can be so common. Under this construction our statute would increase the evil a thousandfold.

One of the eminent counsel for plaintiff does not agree with this construction of the statutes, and I can do no better than to quote his language:

"To my mind these words do not in themselves convey precise notions of relative rights and obligations. The words trustee and *cestui que trust* are used with an indefinite variety of meaning and shades of distinction.

"They no more imply a definite group of duties on one hand and rights on the other, than the words principal and agent in themselves convey a precise notion of the agent's powers, or the principal's rights.

"When these are to be ascertained in any given instance, it always remains to inquire how the agent was constituted—for what purpose, what powers were conferred upon him, what functions he assumed to perform. All these must be known, and accurately

known, before it can be affirmed that, in a given case, there has been a breach of duty. The same is true of a trustee.

"As there are an infinite variety of trustees with duties equally various, the word trustee does not, in and of itself, convey any definite idea of given duties.

"Besides, the word is often employed in a figurative sense, or with metaphorical adjectives which indicate the looseness of its usage.

"When, therefore, it is sought to determine the duties of a trustee in a given case, the greatest confusion is sure to arise, if, after establishing that he is in some sense a trustee, search should be made in the digest, and the doctrine of every precedent arising between a trustee and a *cestui que trust* should be applied to the case in hand.

"To illustrate my meaning upon this point: A guardian is unquestionably the trustee of his ward.

"It is also said that a judgment debtor, whose property has been sold at judicial sale, from the day the period of redemption expires, until the execution of the sheriff's deed, is a trustee of the legal title for the purchaser. But would any one contend that the duties and obligations of each are the same? * * * * * *

"The law presumes that a purchase made by a legal guardian from his ward was obtained by the use of undue influence. Does that presumption prevail when the owner of property sold for taxes buys back from the purchaser the rights which he obtained from the sale?

"The fact that a guardian has not paid full value for the ward's property is absolutely fatal to the transaction. Does the owner who buys back the tax title run the risk of having his purchase set aside because he succeeds in rescuing his property at less than actual cost?"

It may be said here that the difficulty is more apparent than real; that, in the case of the purchase of the tax title, the vendor was evidently not dealing on the basis that he was getting full value for his property. He expected only a large profit on his investment. He will, therefore, be held to have waived disclosure and protection from the trustee. The same line of reasoning may be applied to the case of the wholesale and retail merchant, and in all such cases the circumstances show that there was no actual reliance beyond the particular assurance, and beyond that they will be held to have waived the benefit of the relation. This suggestion has not been made in this case, and would perhaps, be repudiated; but it seems to me that a literal interpretation of these provisions of the code carried to their logical end would necessitate such a presumption, or practically all business would be obstructed.

It would only be an awkward way of getting rid of the paralyzing rigidity of the code, which can but embarrass courts in the administration of justice. One of the boasts of courts of equity was that these rules were in the highest degree flexible, and one chan-

cellor is quoted as expressing the hope that they never would become so definite that they could not be freely varied to meet new exigencies as they should arise. The effort was rather to discern and seize upon the reason of the rules, and to apply that to the circumstances of each case as it should present itself.

The general idea of a trust, as above stated, has reference to the relation of the parties where one holds the legal title to property for another. The rights of the *cestui* were merely personal against the trustee. Courts of law recognized the trustee as absolute owner; but since he acquired title by virtue of the confidence of the trustor, that he would hold the property for the use of another, courts of equity will compel him to do what he has virtually agreed to do, and will prevent him from doing that which he has in effect promised not to do. In many other cases besides these, in which the title to property is held in trust, persons acquire control of the property of another, or influence to control his conduct, or peculiar knowledge of his affairs, through confidence reposed in such persons, and voluntarily accepted. In such cases, and perhaps others, where the circumstances are such that courts of equity conclude that like rules ought to be enforced, they are regarded as trustees by analogy, because the same reasons exist as in the case of strict trustees for the enforcement of the like good faith. But they are regarded as trusts only so far as justice requires the applications of the like rules, and hence, the great flexibility of the law and the great latitude allowed the chancellor in their application. In every trust which imposes actual duties upon the trustee, the trustee becomes to a certain extent the agent of the beneficiary. He has become so through confidence that he will, to the extent agreed, subordinate his own interests to those of the *cestui*. To that extent he will give the beneficiary the benefit of his faculties, his knowledge and his position, but he is bound to this self-abnegation no further than he has agreed. Knowing what he has undertaken, we can determine what duties he owes his principal; and we determine them from the nature and purpose of the confidence precisely by the same process by which we determine the obligations of a contract. It is, in fact, a contract that the trustee will faithfully perform the confidence. The obligations of a trustee, defined by the courts and in the statute, are the duties he must perform in keeping this confidence. He must do all that was expected of him as a consideration of the confidence; he must abstain from every act inconsistent with that relation. He must not allow himself to be placed in a position where he cannot give the beneficiary the unbiased use of his faculties to further the objects of the confidence; and he must not make a profit himself from the relation, to the possible injury of his *cestui*. Impliedly, he has agreed to do and abstain from these things to the extent to which he has agreed to substitute and serve another self in lieu of his own proper self.

And these are the rules of the code, limited always by the extent and character of the confidence to be applied where applicable, and no further.

The purposes for which trusts are created vary as widely as the purposes of contracts and the degree of confidence implied by actual relations vary as widely. How different the active duties and powers of a guardian or an attorney at law from those of a naked holder of the legal title for another. The latter owes no active duty but to convey upon request, but the others are bound to give to their beneficiary advice and counsel, and to be diligent to know that they may wisely advise. Any enlightened conscience would suggest to the one difficulties in the way of dealing with his beneficiary which no one unversed in the code would think of in the other relation. In one relation it would naturally suggest itself to the conscience of a just and reasonable man that he should not purchase from his beneficiary, until he had imparted full knowledge in regard to the property, and that he ought to be able to truly advise his client of every material thing in reference to the transaction. But what would suggest to the naked trustee, who never had control or management of the property or acquaintance with the beneficiary, that he owed his *cestui* in such a transaction counsel and advice against himself?

The law of trusts has been said to be the rule of the highest morality in business affairs. In such a code a good man's conscience ought to be a law unto itself. But no one, without a special guide, could follow these artificial ways.

The general rules in the code must be taken as general rules only, and applicable only to those cases which come within the reason of them. When the reason of the rule ceases, so should the rule: Sec. 3,510, civil code.

Some remarks cited on the argument, and attributed by counsel to Mr. Justice Bradley of the supreme court of the United States, seem quite felicitous on this subject. He is reported as saying of these code provisions: "But they should not be allowed to usurp the prerogatives of justice itself seated in man's bosom, by giving to the letter of the code the inexorable fixity of a statute, and thus reducing the exposition of the law to a question of philology instead of a question of reason and justice. Used as a statement of principles and rules applicable to cases clearly within their scope, and not as a restraint upon the judge in references to cases which are not provided for, and which require a new application of the rules of right and justice governing analogous cases, codes may not only be admissible, but may be of great service in systematizing and perfecting the law. They should never be employed for the purpose of giving to the law a cast iron fixity of form, and thereby repressing progress and imposing a smothering and deleterious restraint upon society itself."

In all probability great trouble and difficulty will yet be encountered by the courts in construing the codes in respect to this matter.

The trouble is more serious because our codes contain not only a digest of the decisions, the *rationes decidendi* on points generally referred to the unwritten law in respect to which flexibility and elasticity is the crowning merit, but also proper statute law, the object

and merit of which is certainty and rigidity, unifo
Some such rule as that laid down by Mr. Justice Brad
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must be explained, as I have before illustrated; other
would prove an unmixed evil. In the text books the
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"These rules apply to every kind of fiduciary re
principle is the same in all of them." And again:
goes further than this. It not only watches over the
lations of parties, but it scrutinizes the undefined
friendly habits of intercourse, personal reliance and co
vice. It is well known that habits of kindness, confide
grow between neighbors and friends, and if advantag
such relations to obtain an unfair bargain, equity will
or convert the offending party into a trustee. Of cou
can be laid down by which to judge all such cases; fo
must, of necessity, depend on its own facts." As
counsel, they contend that all these last named relatio
code called trust relations, because there is the repos
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the active control by the terms of the contract, Exhibit

The authorities seem practically agreed upon the pro
there is no such relation of trust between the directo
close corporation, and the stockholders, as will imperil
between them as to the stock of the corporation. The
trustees as to the corporation, and in respect to the pr
corporation, and are not trustees of the stockholders in
stock. This view has been questioned by some law wr
is difficult to see, on principle, how they can escape the

ities of the fiduciary relation in their dealings with the stockholder, who is not a director, for his stock, which only represents his interest in the property of the corporation. At all events, it raises some presumption of knowledge on the part of the directors, and of control over the property of the stockholder in the corporation. It should be taken into consideration in determining the fairness of any transaction between them. Here the relation of the defendants as virtual directors of the Western Development Company, was quite similar to the relation of surviving partners to the assets of the late firm. The corporation has gone out of business. Practically, it only existed for purposes of liquidation. The case differed from that of surviving partners, in that the corporation must act as a unit through the resolutions of its board, and was not bound because of the death of Colton to immediate liquidation and settlement. The individual directors, too, were not bound, as individuals, to liquidate and settle at all. Mrs Colton could not have complained had they sold their stock in that company without realizing on its assets or settling the indebtedness. They were not her agents then, individually, to sell these assets, and to account for the proceeds. She, too, had the right, secured to her by law, to inspect the books. If this constituted the trust relation, therefore, it was, as all others in fact are, *sui generis*. We must determine their difficulties in dealing with plaintiff, from their active duties and powers.

These certainly did not, nor did any other suggested fiduciary relations, in my opinion, impose upon the defendants the duty of counseling or protecting the plaintiff as one to any extent their ward, in her dealings with the assets of the Western Development Company, or of any other corporation. In reference to the Rocky Mountain Coal and Iron Company, the defendants were in no sense at any time the trustees of Colton. Colton was their agent in its management, and, in that sense, their trustee.

If there was no duty to advise, there was no other obligation upon the defendants than that of a full disclosure of facts, within their knowledge as trustees, which were material for her to know in conducting the negotiations, and to deal fairly with her. This can be better considered, however, in connection with the circumstances of the negotiations and settlement.

I will now proceed to consider some of the most important issues of fact in the case. And, first, in regard to the four hundred and eight shares of Rocky Mountain Coal and Iron Company's stock surrendered by Mrs. Colton. The complaint charges that the defendants falsely represented that this stock did not belong to Colton, but was held in trust by him for defendants and Mark Hopkins, and upon their paying the cost price they would be entitled to demand an assignment and transfer thereof. That she accordingly, believing this representation, upon receiving six thousand six hundred and twenty-five dollars and ninety-two cents, which they represented to be the cost price, assigned the same to the defendants as part, of course, of the general compromise and sale shown by Exhibit F.

That she has discovered that this stock belonged wholly to Colton, and consequently to his estate, and was worth forty thousand eight hundred dollars. The answer practically admits the representation as to the ownership of the stock, but avers that the reason for the claim on their part was fully known to Wilson and Tevis, and also the facts on which their claim was founded, and that no false representations whatever were made in relation to the matter.

It appears that defendants also claimed that Colton had received on this stock held by him in trust, dividends amounting to about twenty thousand dollars, which amount was released to plaintiff as part consideration for the compromise.

Upon the question arising in connection with this issue, an immense mass of testimony has been taken, and there have been submitted statements from the stock books, accounts of dividends and numerous computations intended to prove or disprove the various positions assumed. These arrays of figures as arguments are calculated to bewilder one not more accustomed to such matters than myself; but, after considerable study, I have at least satisfied my own mind upon this question.

The only witness who gives direct and positive evidence in regard to any understanding in reference to the stock is Charles Crocker, and the issue seems narrowed down to the question whether the witness correctly stated the understanding or agreement under which the stock was purchased, or if he did, whether the understanding had not been modified or was not ignored by the parties afterwards.

Charles Crocker states that in 1870 he invited Colton, who then had no connection with the defendants, to visit the mine with him. They went; were pleased with the property, and Crocker purchased five thousand shares for himself and associates, Stanford, Huntington and Hopkins. On the way home, Colton asked permission to buy some of the stock. Crocker assented, and promised if he would buy one thousand shares to make him president and manager at a salary of one hundred dollars per month. To this Colton assented, and set to work at once to buy stock. He was now permitted to buy one thousand shares; subsequently, it was agreed that Colton should buy as much of the stock as he could on joint account of Crocker, Stanford, Huntington, Hopkins and himself. At that time he, Crocker, had five thousand shares for himself and his then associates, and Colton one thousand shares, giving each of them two hundred and fifty shares more than Colton. This disparity was to be maintained, each of the others having two hundred and fifty shares more than Colton.

Such testimony must always be taken with great caution. Memory is apt to be unfaithful in such things; subsequent impressions of transactions blend with original impressions. Colton may have understood the matter quite differently. Had they brought suit for the stock against Colton's representative, this evidence would not have been received. During the years that had passed, Crocker

had been burdened with important matters, and had confessedly paid no attention to Rocky Mountain Coal and Iron Company's affairs. They were intrusted, he says, entirely to Colton. Soon after the agreement to purchase the stock, Crocker sold out his interest in the mine, and in all the corporations with which he and the other defendants had been connected, and started upon a voyage around the would. He was absent two years, during which time he had no reason to trouble himself with the business of the coal company. In October, 1873, he repurchased his former interest, but in the following December again went on his travels in Europe, and did not return until August, 1874. Since that time and until Colton's death, according to his own testimony, he had paid no attention to the affairs of the coal company.

His memory would be remarkable if he retained under the circumstances an accurate recollection of these conversations in all particulars; and the facts do not substantiate his statements.

There was no time prior to his selling out and starting on his travels when Colton had one thousand shares. In fact, there never was a time when Colton had just one thousand shares and the others five thousand shares. Colton was made president and manager of the mine in January, 1871, although he had but three hundred shares, and he acquired no more until Crocker had sold out and started on his travels. The first step toward the purchase of stock which can now be discovered, was an assessment levied on the sixteenth day of August, A. D. 1871, which Wilson was informed was levied to aid their purchase of the stock. The first stock acquired after the agreement to purchase on joint account was in September, 1871. They continued then to purchase, the stock being conveyed either to Colton or Stanford, until November 12, A. D. 1873, when a division was made by Colton and S. A. Hopkins, the latter acting for Stanford, Huntington, Hopkins and Crocker. This was an equal division of the whole amount of stock, including the five thousand shares purchased by Crocker, and is a practical interpretation of the contract by the parties. It is said this was the act of Colton, the others confiding in him. But the fact seems to be they did not confide wholly in Colton. They were represented by S. A. Hopkins. There was then no reason why they should have such implicit confidence in him. He was not then connected with the railroads. He was then simply a trusted employee. Hopkins would not have acted for them in so important a matter without first informing himself of their rights. Colton had no authority over him. And there is no apparent reason why he should have taken Colton's statements in a matter in which Colton's interest conflicted with those of his employers.

And then this equal division was allowed to stand for five years and down to Colton's death. During that time there had been seventy-eight dividends, by which they had divided more than one-half million of dollars. For sixty of these Crocker had personally receipted on the dividend book, for the dividends on his own shares;

and on the same page on which he signed his name was shown the amount of stock held by each stockholder. Most of the stock was held by the five, and generally there were only fourteen stockholders in all. Crocker often receipted for the dividends of the other three also. On each page where he gave these numerous receipts was spread out before him the evidence that the disparity he claimed did not exist.

Stanford receipted personally under the same circumstances thirty-seven times, and Mark Hopkins, for his own dividents and Huntington's, thirty-three times.

This corporation was also in effect a close corporation. Crocker, of course, knew the total amount of stock in the corporation. It was receiving almost its entire income from the Central Pacific, under an arrangement, which, perhaps, would not have been made only that they held the stock. The evidence shows that the defendants considered themselves entitled to these profits, because they came from the contract with the Central. It also appears they knew just who owned the stock. It all belonged to such persons as they permitted to hold it and to no others. All were their employees. The dividends to such were undoubtedly understood to constitute extra compensation. This was expressly so with Colton, who was told that one hundred dollars per month was a sufficient salary, because the stock would pay a dividend right away from its contract with the Central. Naturally, each would know what proportion of the whole stock he should hold. The dividends were monthly and generally were one dollar for each share of stock. At each dividend each would be reminded of the number of shares he held. On the page where each signed the receipt, was also displayed the number held by the others. There, on the same page, where each signed, was shown, if the theory of the defendants be true, the evidence that Colton had more than his just proportion. It is not to be believed, either, that Colton would have risked this, or the others overlooked it. There were always some shares held by trustees, and it is suggested that Colton kept a portion concealed by being held by others. It is evident, however, that the defendants and Colton assumed the right to say who might become owners; that none held stock without their permission. It is fair, therefore, to conclude that they knew who really owned the so-called outside stock. At all events, they must have known how much of this outside stock they had permitted; and, knowing his own holding, each knew, or had the data for knowing, whether he had as much as he ought to have had. They would not, in all probability, overlook so material a matter as a disparity of two hundred and fifty shares to each.

The theory, then, of this unequal holding, is not admissible. It is too plain that they have divided among themselves on a different basis, which they recognized too often, and acquiesced in too long to be now set aside on this showing.

But this does not quite close out this question. After the division in 1873, Colton purchased three hundred shares more from the estate of Deuel, which he held undivided at the time of his death. Was this acquisition also subject to the contract with Colton that he should buy on joint account? At the time of the division the entire stock of the corporation had been purchased or was held by parties who were expressly permitted to retain the stock by defendants, and plaintiff contends that, under such circumstances, the division was a final settlement upon full performance of that contract. All having been acquired, there was nothing further to be done.

The stock which the five principal owners permitted others to retain is spoken of by witnesses and counsel as stock outside the arrangement between Crocker and Colton. Therefore, it is contended any one could buy this stock and hold it as outside stock to which the associates had no claim. But certainly there is another side to this. The stock paid a very large profit upon the cost. This profit came from the Central. The defendants assumed all the time —and Colton assented to the claim—that they had a right to these profits, or to say who should share in the good thing. Only their employees were allowed this privilege. Deuel was an employee, but he died. Evidently it was not desired that stock in this practically close corporation should really get where they could not control it. It would then not be within the reason of the permit to hold outside, for it would no longer serve their interests to allow others to get the benefit of it, and they might be embarrassed by it.

But if it were doubtful whether this stock was purchased for joint account, the letters and acts of Colton seem to remove all doubt. At the time of the division, Colton was negotiating for its purchase, and confessedly for others as well as for himself. The transaction, however, was not concluded until December 27, 1873. On the twenty-sixth of December, Colton wrote to Beeman, who was attending to the matter for him at Evanston, as follows:

"How are you getting along with the coal stock matter with Frost? I hope he will close it up soon, as he agreed to, so I can get the matter off of my hands. I don't want six thousand dollars lying there idle. What does he say in justification of his conduct? I reported to parties that I had bought it, and part of the money belongs to them, and they begin to act as though there was something wrong on my part, as they can't get the stock and have sent the money. You and I know it is all right, but it places me in a bad position, having told them I had bought and got their money."

It is suggested that this letter was evidently written to hasten the business, and that plainly some of its statements are untrue. Defendants do not claim to have furnished any of the money; and if they had, and were getting anxious about it, they would never have permitted Colton to retain the stock through any neglect to look after it. This view places Colton in a very unenviable light. Few people would justify such positive misstatements. In regard to the money, it is like many other unexplained matters in the case. It is

not very positively stated that any complaints had been made about the matter by his associates, and this part may have been purely imaginary, but plainly this letter affords sufficient ground in a matter which was before doubtful to turn the scale against Colton.

He had then three hundred shares, which he ought to have divided. He was, of course, entitled to retain one-fifth. This left in his hands two hundred and forty shares, which defendants and Mark Hopkins were entitled to demand upon paying the cost price. They represented to Mrs. Colton that they could claim four hundred and eight shares, and, on that representation, she assigned that number of shares to them. The difference is one hundred and sixty-eight shares, said to be worth par, or sixteen thousand eight hundred dollars.

Was this a misrepresentation, and has the plaintiff been misled to her injury? The misrepresentation, if any, consisted in Crocker's version of the agreement with Colton, that there was to be a disparity in amount of stock held by each. Computing with this as a basis, Wilson found, or they found, and so represented, five hundred and ten shares still undivided. Deducting Colton's fifth, there were left four hundred and eight shares to which they had a right.

This was clearly a misrepresentation, whether intentional or not. It was not true as applied to the real transaction, and was relied upon. It is said that Wilson knew all the facts and circumstances upon which they based their claim, and, therefore, was not misled, but might have formed his own opinion as to its validity. But a material circumstance was the statement of Crocker that the rights of the parties with reference to the stock depended upon this alleged contract with Colton, under which he represented the stock was acquired. In effect, we find this statement was untrue. Certainly, Wilson had a right to rely upon this representation, and he did rely upon it, and relying upon it, may not have examined as he otherwise would have done. Defendants, therefore, must be held responsible for it, even though Wilson may have had the data in his hand from which he might have discovered the improbability of the story.

I next propose to notice, very briefly, the charges against Colton in connection with his alleged indebtedness to the Rocky Mountain Coal and Iron Company. A very large portion of the time occupied by this long and tedious trial has been devoted to this matter, and here has been manifested the greatest amount of interest and feeling. I propose, because of the obvious unpleasantness of the subject, to say as little about the matter as possible, and yet pass upon the issue raised.

It is claimed by the plaintiff that the defendants represented to her that Colton was indebted to the Rocky Mountain Coal and Iron Company in the sum of one hundred and eighty-one thousand eight hundred dollars and ninety-nine cents for moneys which Colton had fraudulently appropriated and embezzled, and that Exhibit D is a correct copy of these alleged liabilities, as also of certain alleged liabilities of a similar character to the Western Development

Company for about twenty-six thousand dollars. It is also averred that defendants threatened that unless their demands were complied with, they would attack the reputation of Colton and would disclose such facts and bring such charges against his honesty and integrity as would blast his reputation and memory. This threat has reference to these charges of embezzlement. She avers that since the compromise she has discovered that Colton was not so indebted, and had not embezzled the said sum or any sum, and had not fraudulently or otherwise appropriated any money, and that the claim of defendants that he had, was false and simulated, and created for the purpose of coercing her into an unfair settlement. The plaintiff says that these alleged threats to publish these charges against her husband, coupled with the fact that she could see no way at that time to answer or disprove them, was the real cause of her accepting the terms. Afflicted and stunned as she then was by her unexpected bereavement, she was ready to sacrifice anything to prevent this charge from being made public.

It is well to note, preliminarily, here, that this statement, Exhibit D, except the alleged indebtedness to the W. D. Co., is made up entirely from the books of the R. M. C. & I. Co. This company and these books had always been under the special supervision of Colton. One set of books was kept at the mine, in Wyoming Territory; another, and the principal ones, at Colton's office in San Francisco. The bookkeeper, for the greater part of the time, at San Francisco, was his brother-in-law (brother of plaintiff), and for the remaining period his nephew. He frequently had the books laid before him for his personal inspection. He was president, manager and treasurer of the company. None of the defendants had ever seen the books prior to Colton's death, and they knew very little of the affairs of the company. After Mr. Colton's death, the books were submitted to an expert, and the charges in Exhibit D were the result. The expert was Mr. Gunn, who was an officer and employee of one of the corporations controlled by the defendants. The examination was commenced in December, 1878. January 15th following, Mr. Wilson's attention was called to it by Mr. Crocker, who told him of the alleged irregularities, that they were trying to clear it up, and he hoped they would be explained. They were looking into the facts. They were examining and investigating. Afterwards, the examination continued, and from time to time new items were shown to Wilson. Wilson was a member of the constitutional convention, and as soon as it adjourned, which was March 3d, he set to work to examine these charges. The books and papers were at his disposal, and Mr. Gunn, under instructions from Crocker, assisted him, showing him all that he claimed to have discovered, and his evidence in support of each charge. They had frequent interviews, which sometimes lasted all day long. They examined the books together, and as each new discovery was made by Gunn, he informed Wilson, and it was investigated by Wilson. In this way Exhibit D grew up under Wilson's eyes. It

was impossible that anyone could have been better informed than Wilson was as to the manner in which it was made up, and the foundation of the charges expressed in it. Wilson, in connection with the plaintiff, and some few friends who were occasionally consulted, thoroughly examined the private books and papers of Colton in regard to the same matter. He sought information from various other sources. Unquestionably, the most thorough examination and investigation of these charges made prior to the settlement was that made by Wilson. He certainly was better informed in regard to the importance and gravity of these accusations than any other person could have been, unless we suppose, without evidence, that the defendants had some knowledge which they have suppressed in regard to some of the expenditures claimed to have been made by Colton.

On the contrary, all the circumstances seem to indicate that the defendants knew very little about these matters. For a large portion of the time, during which these malversations are alleged to have occurred, Colton was not the trusted associate of the defendants, except in the management of the coal company. There is no more reason to suppose that he would be expected to use the funds of the company for purposes which could not be safely shown on the books than any other employee.

I am not going into the discussion of how much it would help the reputation of Colton to suppose that these otherwise unexplainable appropriations can be explained, by the suspicion that they were intended to be used in improperly influencing the officers of the United States land department, or in procuring testimony by means which it would not do to have known. Certainly if an agent has taken money of his principal without authority he could not defend by a mere suspicion that he had expended it in bribing officers of the government or in subornation of witnesses in the interest of his employer. Since this suit was commenced, very thorough examinations have been made of the books by experts on both sides, and it is safe to say that information has been sought from all sources which there was the least reason to believe could afford any light. Some few items have been shown to have been incorrectly charged. So Wilson discovered, for he says his investigations generally, but not always, met with adverse result. These very complete and thorough examinations may have discovered, and probably have some explanations, as to a few matters, beyond what Wilson knew. Taking the whole thing, however, I do not see any advance whatever in regard to the culpability of Colton beyond the position which Wilson occupied. Nor have I found much argument upon the subject beyond those suggested by Wilson and Tevis in regard to the improbable nature of the charges and the charity with which after his death his conduct should be judged, or the difficult circumstances in which the defense is made by Colton's representatives. We are not now, for the purpose of this case, to pass an absolute judgment upon the guilt or innocence of Colton. If the

charge be discredited, the accuser is not, therefore, condemned. They certainly have not been altogether disproved; in fact, only to a very small amount. Of course, not all of this very large indebtedness was really charged to have been misappropriation. The pleadings on both sides speak of them as such, but on the face of the exhibit the contrary plainly appears. I do not care, however, to enlarge upon the matter. I am prepared to find:

That the full extent of the representation was, that the statement contained a result shown by their books, as reported to them by Mr. Gunn; and, further, that Wilson knew how the statement was made up, and all the evidence for each item of the charge. That while the statement was in some respects inaccurate, as Wilson well knew, yet, in the main, as a mere matter of accounting, it was correct. That the defendants did not cause it to be prepared or make any charges in reference to it for the purpose of coercing the plaintiff into an unjust or any settlement of her relations with them; but the account was presented in good faith and for the purpose of collecting the amount claimed from the estate of Colton. In fact, having found these apparent discrepancies on the books, I do not see how a disclosure to the plaintiff could have been avoided. There would not have been a full disclosure of all the facts had they suppressed this.

I now come to Exhibit E, attached to the complaint, or rather to the complaints, made with reference to the matters contained in it. It is averred in effect that the defendants, to influence the action of the plaintiff and induce her to execute the assailed contract, represented that all the stocks and bonds received by her from the estate of her deceased husband were insufficient to pay the million-dollar note, Colton's indebtedness to the Rocky Mountain Coal and Iron Company, and Colton's proportion of the indebtedness of the Western Development Company, and Colton's indebtedness to themselves. That to sustain these representations they presented a statement of the assets and liabilities of the Western Development Company, which is Exhibit E. They also represented that the Western Development Company was insolvent and unable to pay its debts, and that it would be necessary to return the dividend improperly made by Colton. This dividend constituted a large portion of the assets of Colton's estate. It is also averred that they represented and asserted that the valuations contained in the statement were the true and full values of the assets of the corporation; and they further represented that it was necessary to, and they intended to, and would forthwith cause to be levied an assessment of many millions of dollars upon the capital stock of the corporation. Then follow allegations of reliance upon the representations, and her subsequent discovery that they were false.

It appears that Wilson first called at the office of the defendants and desired to know the value of Mrs. Colton's interests there. He was at once informed that there were difficulties in the way. Mr. Crocker had already informed Mrs. Colton in response to similar

inquiries that the business was so extensive and so ramified that it was difficult to give any correct opinion about it. As early as January 15, 1879, Wilson had commenced making inquiries to find out what Colton had and what it was worth. In a letter of that date to plaintiff he relates an interview with Mr. Crocker. He was then told that the Western Development Company was largely indebted, and it might be necessary to recall the dividend; that the settlement of the business of that company was a necessary preliminary to getting at her rights. He sought for a statement of the assets and liabilities of the company, and, having in some way obtained a rough statement, was informed by Mr. Crocker that he must not rely upon it, that they were preparing a more perfect statement, which he would furnish. The statement, Exhibit E, was made out and presented to Wilson as the more perfect statement promised. The original statement was made up by Mr. Douty, but without the valuations. Wilson also had this original statement made by Mr. Douty. The statement was changed in some respects by Mr. Brown, and the value of each item, or an estimate of the value, added.

These values were made at the request of Governor Stanford, and Wilson was informed that the values were the result of the combined judgment of all the defendants, and all through the negotiations which followed, they insisted that they were the very highest values. These valuations became a very important matter in the negotiations, and were the subject of frequent controversy between Wilson and the defendants. There can be no doubt, therefore, that the statement was furnished to Mr. Wilson as a correct and full list of the assets and liabilities of the Western Development Company as they appeared upon their books, and that the values were in the negotiations represented and insisted upon as the highest values of such assets in the opinion of the defendants. It is important here to consider the circumstances under which this statement was furnished, and somewhat more minutely, how it was regarded and treated by the parties, to understand just the force of the representations, the purpose for which they were made, how they were received, and the degree of reliance which was placed upon them and which the plaintiff was entitled to place upon them.

Along with Exhibit E, and Exhibit 17 Douty, which last is the original from which Exhibit E was made, there was also furnished an inventory of the property turned over by the Western Development Company to the Pacific Improvement Company. Wilson says that he regarded this transfer as absolutely void, and the inventory only as a convenient mode of getting at the assets of the W. D. Co. Douty was also directed to aid with such information as he had; and it is admitted that he did so thoroughly and well. He was the president of the W. D. Co., and its bookkeeper, and knew more of its affairs—outside, of course, of questions of policy, which were entirely controlled by the individual defendants—than any other person. He was Colton's nephew, and had been his confidential clerk. The inventory was made up under his personal supervision, and he

was fully able to explain the meaning of the terms used, and how far it could be relied upon as a correct list.

Under the circumstances, it is obvious that the defendants could not be expected to know much of the affairs of the corporation in detail; and no human being well could have an accurate knowledge with reference to all its assets and liabilities. It must also be remembered that the parties did not deal with each other under the influence of any relation of trust then known to them. She did not know or understand that they owed her any duties; nor did they furnish these statements in discharge of any such obligations. If she relied upon them, it was not because of any trust or confidence in them or their obligations to inform her. They dealt as strangers, and at the time each party believed they had a right so to deal. She now seeks to avoid the contract as well on the ground that she contracted in ignorance of this relation, as on the ground of their failure to perform its obligations.

All the way through, defendants assumed the right to negotiate as strangers; to cheapen what she had to sell. Very early the question arose: Can the W. D. Co. pay its debts without the return of the dividend? There was no controversy about the liabilities; the whole matter was reduced down to the question of values—the value of the assets of the W. D. Co. Of course, the balance either way after realizing the assets, if the dividend was returned, depended upon the same question.

I do not see that plaintiff, or Mr. Wilson for her, ever demanded or expressed any desire for these valuations, unless it was understood from the desire to know the value of Mr. Colton's interest there. They seem to have been volunteered, and I think it not unfair to presume that they were offered as an argument or showing to support their claim that the return of the dividend was required to enable the corporation to pay its debts.

The next inquiry naturally is, whether these values were statements of fact, or were mere expressions of opinion for which the person expressing them cannot be held responsible.

I don't overlook the cases in which mere expressions of opinion have been held to be such representations, as, being grossly false and made in bad faith, will suffice to avoid the contract. Uncertain as such statements are, the case may arise in which the one party must necessarily rely upon them as affording all the information he can possibly get, not only as to values, but as to the subject matter of the contract. It becomes no longer a mere opinion; or, if in some cases it is a mere opinion, they are cases in which the defrauded party has the right, under the circumstances, to the benefit of the sagacity and judgment of the person making the representation.

There is no claim that any of the stocks or bonds in question had any market value unless it be the bonds of the Southern Pacific, and as to these the claim is rather faintly made, and certainly the evidence plainly shows they had none.

What are the values, then, which are expressed in Exhibit E. The phrase intrinsic value has been used, although this is not the meaning insisted upon by the plaintiff. But if there was no market value, what other value could it have? This phrase is used in opposition to market value, or fancy value, or special value to some individuals, and perhaps in other connections. Except as a comparative term it is difficult to extract any meaning from it.

Value is said to indicate the relation the purchasing power of one commodity bears to the purchasing power of other commodities, and generally to money, the universal medium of exchange, and which furnishes, therefore, the criterion, or unit, for the estimate of all commercial values. This is the only meaning it can have here, or which would have been deemed material in these negotiations.

The vital question was: How much can be realized from these assets to enable the corporation to pay its debts and to divide among its stockholders? The values must have been estimates of what these securities would bring if placed upon the market.

When we prove the value of such securities we place on the stand an expert. Now, what must he know, to make him an expert? Why, simply what the securities have sold for, and an acquaintance with the market sufficient to enable him to say that at a certain time they did bring, or would, if offered, probably, have brought, so much.

These experts are not required to know anything of the properties represented by the securities. It is really a fact to which they are called—what did they sell for? It would require a very different species of knowledge in an expert to tell what a certain stock would bring, if offered, it having no market value established.

The elements which make up the value of railroad stocks, are very numerous and uncertain. In the best assured stock of the kind, there must, necessarily, be a wide margin of uncertainty. When we have determined what the security ought to bring, we all know that we are still far from knowing what it will bring. If this were a determinable quantity, *stock* gambling would cease to be synonymous with dealing in stocks. The evidence abundantly shows how delicate a science the manipulation and handling of stocks and other railroad securities has become, and how difficult the task of creating and maintaining a market for it. The contract with the syndicate to sell the S. P. bonds proves, both that previously there had been no market for the bonds, and how difficult it is to dispose of the securities, even with a contract assuring the continued solvency of the securities; which seems almost like taking a bond of fate.

In short, there being no market value for these stocks and bonds, any statement as to value was necessarily a mere opinion. And all the circumstances show that it was so regarded. Why could not Wilson find out the values from some one else? Of course, because they had no established market value, and when it was said that no one knew except defendants, as is still said and constantly repeated

here during the trial, it must mean, not that there is any absolute value which they refuse to communicate, but they are in a condition to form an opinion better than any one else. If the word value had reference to the productiveness of the stock, or the earnings of the roads, Wilson seems to have been fully informed on the subject. Nor did the plaintiff or Wilson accept or rely upon these values. Wilson's memoranda, made during the negotiations, show page after page of computations upon different bases. He says he regarded them as estimates. In fact, all the way through, the controversy was over these values. He regarded them as too low. These values meant the terms proposed by the defendants. Wilson demanded more, and, to enforce his views, always insisted that the values were too low. And, finally, when in despair, he communicates his failure to Mrs. Colton to get a better offer, he says: "They seem relentless, immovable and inexorable, and assume that they know values better than others." By this, he says he means that they stood upon their values, and, therefore, upon their offer. In other words, they stood relentlessly, immovably and inexorably upon their values as a basis of settlement. This was Wilson's complaint against them. It was what he attempted to move them from. It was the very bone of contention. Plaintiff did not rely upon them. It was her grievance that defendants would adhere to them.

But the compromise itself shows that it was not made upon the basis of these valuations. An additional consideration of two hundred thousand dollars in S. P. bonds was paid, worth, according to the valuation in Exhibit E, one hundred and twenty thousand dollars. As Colton only had one-ninth interest in the W. D. Company, it would imply an increased valuation of over one million of dollars, if we apply the increase to that company alone, and here, certainly, was the controversy, outside of the charges against Colton, to which I have before alluded. And, in any event, this additional payment shows that it was a lump settlement, and not made upon any idea that they knew the exact balance which ought to have been coming, or knew the value of assets or amount of liabilities.

Here was a raise at the last moment of more than one million of dollars on the balance which it was claimed would be left after the liabilities were discharged; or if it were a surrender of a portion of their asserted claim against Colton, the showing is equally important. One party claimed, in addition to the conceded property, one million of dollars; the other party will give nothing. A compromise was effected by paying one hundred and twenty thousand dollars. Could anything show more strikingly how the parties realized the uncertainties in the transaction?

In addition to these considerations, as I shall have occasion to show in another connection, the values or estimates in Exhibit E were present values, if sale of the assets were necessary for immediate liquidation; and were merely speculative; and both parties, at the time, fully understood that if they were able to hold them, a much larger price would, in all probability, ultimately be realized. Now,

it seems to me that the three exhibits, E, 17 Douty, and the inventory of property turned over to the Pacific Improvement Company, with Douty to explain them, came as near showing all that the books would disclose on the subject as could possibly be got at. This is all that Wilson could have understood them as purporting to show, and, as already stated, no one could have been better informed than Douty as to the probability that the showing was a fair one. If I am correct in my construction of the provisions of the code concerning trusts, there were no active duties due from the defendants to the plaintiff, in consequence of any fiduciary relation, beyond that of full disclosure and fair dealing. They were not bound to give her counsel or advice, nor, like an attorney at law, were they bound to see that "their diligence was not surprised" in their service of their beneficiary. In other words, if they informed the plaintiff of what they themselves actually knew of material facts, and afforded her other opportunities of investigation, such as they themselves had, they fully discharged their obligations. But it is contended that there were material facts known to the defendants which were not disclosed. Among these, perhaps the most important is that they had been negotiating with certain parties in New York for the sale of the bonds of the Southern Pacific and the stock of the Central Pacific. It appears that it was left to Huntington to provide for the marketing of their securities. It was his habit, as soon as an issue of bonds was provided for, to begin to talk up, and to prepare the market for them. Some of the S. P. bonds had been sold in the market, but in small quantities, and under such circumstances that, in the opinion of the experts, no market value was established. Speyer & Co., prominent dealers there, had been spoken to about them, and the question of their validity had been submitted to a firm of attorneys who were usually consulted by Speyer & Co. There is some little doubt whether this talk with Speyer & Co. was before the compromise, but, in all probability, it was before. No arrangement or contract of any kind had been made, however, at the time of the compromise. About five months after the settlement, a contract was made with Speyer & Co. for the sale of bonds to the amount of one million dollars, with an option of nine millions more, at prices much above those set out in Exhibit E. About the same time, a syndicate was formed for the sale of C. P. stock at seventy. There is no averment in reference to this matter in the complaint, but, on the trial, defendants' attention was called to the claim of plaintiff in reference to it. Wilson says he had no adequate idea of this contemplated arrangement. It does appear, however, that Wilson knew that efforts were then being made to place these securities on the market.

He was distinctly informed of this, under circumstances which made it manifest that it was not mere street talk. Now there was, so far as disclosed, nothing fixed, definite or certain which they could have informed Wilson or the plaintiff of. If Wilson had deemed the matter of importance, he knew enough to put him upon inquiry.

And, apparently, he did know about all he could have been told. Every one knew they would be sold as soon as a fair price could be obtained; and this was plainly taken for granted, both by Wilson and Tevis. They had then no contract, and but for the "boom," as it has been called, probably would not have had.

Another matter, concerning which it is claimed there was not a full disclosure, is that there was due the Western Development Company from the Northern Railway six hundred and thirty-seven thousand dollars for work done, which they intended to allow, and which was allowed within a week after the compromise, and to pay which the Northern Railway issued six hundred and ten bonds of one thousand dollars each, with back coupons sufficient to make up the amount. There is no evidence that this allowance was comtemplated at the time of the compromise, but it transpired so soon afterward as to suggest it.

The Western Development Company had built the road and turned it over to the Northern Railway Company. After the W. D. Co. had practically gone out of existence the roadbed above Benicia sunk. The Pacific Improvement Company filled the sump at a cost of eighty-five thousand dollars. This was charged to the W. D. Co. on the idea, I presume, that the roadbed had been imperfectly made, and, therefore, that company had really not completed the construction. It was charged to the expense account of that supposed contract. Proceedings were inaugurated after the compromise to recover from the Northern Railway six hundred and thirty-seven thousand dollars for this expenditure of eighty-five thousand dollars. Douty, as president of the Western Development Company, was ordered to write a letter to the president of the railway, making the claim.

The same authority requested W. V. Huntington, president of the railway, to have the claim allowed. The claim was allowed, of course, and the bonds and coupons issued, the order admitting that the claim was one of undoubted merit. The officers of the corporations were all really employees of the defendants, and the defendants and Mark Hopkins then owned all the stock—at least, practically. Regarding this as really an allowance of a claim, it was apparently a mere gratuity. But evidently it was nothing of the kind. It was not really a claim. The defendants and the estate of Mark Hopkins, owning all the stocks and bonds of the corporations, determined to issue more bonds upon the road, which was their property. Had they seen that their interest required it, they would doubtless have mortgaged the road for millions more, instead of a few hundred thousand. So long as it was their property, and in reality unincumbered, I see no reason why they might not do so, nor what harm it would do the plaintiff if they did. Why they resorted to this hocus pocus of a pretended allowance on account of construction does not appear, but reasons can easily be imagined. The right to pledge the property for their debts is one incident of ownership. When she sold her interest to them, she knew this

was an advantage they acquired by the sale; and when the bonds were issued they merely had their own paper secured upon their own property. They own the property for this purpose as much as for any other. Whether they should mortgage or not, or for how much, are matters of mere policy.

That the defendants have managed these corporations to advance their individual interests, and have treated the corporations as their individual property, is certain. In an affidavit filed here during the trial, the plaintiff says, with reference to the management of the Central Pacific:

"They have systematically subordinated the interests of said corporation to their own individual uses and purposes, and have caused said corporation to borrow large sums of money at a burdensome rate of interest for their own individual uses free of interest, and have used the moneys that were in the treasury of said company for their individual purposes to the extent of many hundreds of thousands of dollars, without giving any security or paying interest therefor."

There is a large measure of truth in this charge, and it applies not only to the Central Pacific, but to all the corporations under their control, and to the times before Colton's death, as well as after. So long as there were neither stockholders nor bondholders other than themselves, I see no reason why they might not do so.

The same reasoning applies in the same way to the matter of ninety-two thousand six hundred and forty dollars in the bonds issued to them after the compromise by the Northern Railway and San Pablo & Tulare. Here the company also owned all the stock and bonds of the roads. There was here, however, a contract which Wilson must be held to have known. Having consulted freely with Douty, I do not see how we can avoid charging Wilson with knowledge of the basis of this estimate in Exhibit E. In regard to the sinking fund bonds said to have been appropriated by S., H., H. & C., at less than their real value, it is hardly necessary to speak. There is no charge with reference to it in the complaint, and on reflection I feel bound to hold that there is no competent or sufficient evidence of their value. It seems that this sort of thing had occurred before, during Colton's lifetime. I feel a suspicion that the bonds were acquired for S., H., H. & C., and that all parties knew that their temporary rest in the coffers of that company was merely a stage in the process of deglutition.

The subscription to the stock of the Northen Pacific and the San Pablo & Tulare is a matter not so easily disposed of. This I have said I consider admissible on the issue as to the solvency of the W. D. Co. Yet it ought to be considered in view of the fact that defendants' counsel did not understand until the argument that they were claimed as assets. These subscriptions were made in 1871 by the individual defendants and Mark Hopkins, as organizers of the corporations. The statute required a subscription of one thousand dollars for each mile of the proposed road. These subscriptions

were evidently made to comply with the law. Colton was not then associated with the defendants in railroad matters, nor was the W. D. Co. then formed. The ten per cent required by law was paid, but nothing more. The stock was surrendered to the W. D. Co. The W. D. Co. debited itself with the portion unpaid. It is now sought to charge the defendants with this amount as an omitted asset of the W. D. Co.

I have said that the relation between these parties was that of joint adventurers, or, at least, of persons jointly working to accomplish a common end. We find that when a new corporation is needed to carry out their projects that it has been formed under the auspices of the W. D. Co., which is their common agency; that sometimes their employees became corporators and the stock is held for the associates.

Prior to Colton's advent into the association, the relation of the other parties to each other was the same, all the stock of the corporation formed would naturally belong to the associates. The balance of the stock not subscribed for they got on the construction contracts, and since, it seems, the value of the bonds exceeds the cost of construction, the stock really, if we look upon the bonds as assets, costs them nothing. Indeed, it has been said as to some of these corporations, it is only valuable for purposes of control. It is impossible to suppose otherwise than that the subscriptions would be regarded as burdens which the associates would expect to bear equally. I think it was admitted that in some cases of such corporations being formed the subscriptions were really paid by the W. D. Co. I can see no real reason for a different rule being applied to these. Colton allowed these subscriptions to remain unpaid for years, and I do not doubt but he thoroughly understood that they were not to be paid.

As to the unfinished contracts, Wilson knew all about them. He testifies that he told the defendants that they could not take the assets of the W. D. Co. to themselves by the pretended sale to the P. I. Co. That he did not recognize the transfer, and that there were unfinished contracts on which large profits would be made, and that the W. D. Co. was entitled to these profits. This, independently of the fact that these main contracts had fallen by lapse of time and failure to perform before the death of Colton, will dispose of that matter.

There are many other items claimed to be omitted assets of the W. D. Co.; that is, assets not mentioned in Exhibit E. Some of these are confessedly so; among them, the item of one hundred thousand dollars paid out by Huntington, and which he is unable or unwilling to explain, and other small items which it is not necessary to mention here. On the other hand, the defendants claim, and have shown, that there are many assets in Exhibit E which did not in fact belong to that corporation; also certain liabilities not there enumerated. It is strenuously insisted by plaintiff's counsel that these matters are entirely immaterial; that having furnished a statement of the assets

and liabilities, they are bound by the statement; that the statement was the basis of the settlement, and if it be materially incorrect either way, plaintiff is at liberty to avoid the contract. But I think, in the first place, this shows a misapprehension of the character and purpose of the statement. It in effect was only understood to be a showing of what was contained in the books, as already stated. To this extent it was correct. Then the parties plainly did not settle on the idea that they knew the assets or liabilities, but evidently recognized the fact that there was very great uncertainty in that respect. But a distinct issue, as elsewhere stated, was made as to the solvency of the W. D. Co., and its inability to pay its debts without the return of the dividend. Upon this issue it was clearly admissible. The showing made in the exhibit was in support of the representation of insolvency, but still only of the condition as shown in the books. With such a vast mass of assets of such various kinds and so widely scattered, in a business of such dimensions still going on, it could not be that the books would ever be entirely up or fully show the assets and liabilities.

Under such circumstances common sense and ordinary ideas of justice would suggest that it might be shown that at least the statement was a fair one; and since, if we take the position that the values were relied upon, the statement becomes merely a list of money items, what difference can it make how each amount was made up? Of these counter-claims there can be no doubt that Exhibit E includes the so-called Miller assets, valued at one hundred and nineteen thousand dollars, which did not, in fact, belong to the Western Development Company, and omitted of its liabilities a demand in favor of the Southern Pacific for failure to furnish the road of about one million of dollars. At all events, the deductions to be made from the enumerated assets, and the additions to be made to the liabilities, will more than counterbalance the errors on the other side. In short, on the subject of concealment or intentional misrepresentations as to the *corpus* of the assets, I find no evidence of such in the record. The case could hardly have afforded more conclusive evidence that there was nothing of the kind. Every one knew and must have known that no human being could accurately know the vast business in all its details. The books were thrown open to Wilson or to any expert he might see fit to employ. He did spend many days—I may, indeed, say months—in the examination of the books and papers, and had the assistance for this purpose of the book-keepers and officers of the different corporations, who were directed to, and did, afford him in good faith, all the aid in their power. Wilson, for months, devoted a great deal of time to the investigation, and only desisted when he was convinced that further efforts in that direction would be of no further use.

Plainly, the defendants represented their own views in the negotiations, and sought to make as good a trade as possible. I believe the values in Exhibit E were, as already stated, for that purpose. Within a few months afterwards they were able to realize enormous

profits over these prices upon the property acquired from the plaintiff. There is a natural inclination to judge the transaction in the light of this after event. In fact, it requires a strong effort not to do so. But the values were present values, made in response to the determination, or, perhaps, the necessity, on the part of Mrs. Colton to sell out; and it was not denied, at the time, that the defendants hoped to realize a large advance on those prices. She insisted upon immediate settlement. She was promptly told that the value of her interests could not be ascertained except by liquidation of the affairs of the W. D. Co. She still insisted upon obtaining some definite balance, and to be allowed to retire from the business without further liabilities or complications. These values were furnished as a basis for a settlement, being an estimate of prices which might be realized by immediate liquidation. But they admitted that they all the time expected to get more for the assets by holding. Wilson says they represented that without the return of the dividend the corporation was insolvent; the assets would not pay the debts without careful nursing and management, which would take a very considerable period of time. By watching and carefully nursing, the assets could be made to pay, and would. In such event, of course, they would have had the dividend clear after paying the debts. This is all Wilson claimed, and it seems they admitted to Wilson that at least they hoped to do as much.

Tevis shows that he understood the matter of these valuations in the same way. He was very familiar with the railroad system, and particularly with the Southern Pacific. He thought the values merely conjectural, highly problematical. He says the values in Exhibit E were, at the time, fair estimates. That, in his interview with the defendants, while acting for the plaintiff in the negotiations, he stated in effect that, under their administration and what they would do, the connecting roads they would build, considering, also, the lease to the Central Pacific, they would ultimately make the bonds par. They, in reply, claimed his estimates were in advance of actual values; that they were not bound to go on and create a market for these securities; that other roads were being built in competition, and the whole country was full of gloomy prospects, and they would do nothing, but preferred that Mrs. Colton should go on with them, pay Colton's note and contribute her share. Tevis replied that she was not able to do this, but would sell for less than she could make out of it. Here we see admitted that plaintiff expected that they might realize par for these bonds, and understood, or, at least, her agents did, that she was getting less than she would if able to stay in and contribute her share. But, it is said, that the defendants had themselves placed a higher value upon these securities, and again, within ten days after the assailed transaction, paid a debt to a fund for which they were trustees, in Southern Pacific bonds, at ninety cents.

The Western Development Company, on September 1st, paid their note of three and one-half millions to one of the Central Pacific sink-

ing funds in these bonds, at ninety. The defendants were, of course the real parties on both sides of this transaction. Their interests, however, were more with the payor than the payee. They took advantage of their power to pay their own debt with the bonds at a high figure. Of course, a trustee ought not to act so. It is said, in their defense, that they discounted the future; that they felt confident that when the sinking fund would be wanted the Southern Pacific bonds would be worth par, and, therefore, prove a good investment. This is not a satisfactory explanation; but I have already quoted a passage from plaintiff's affidavit as to the manner in which the defendants habitually regarded their trusts. It is somewhat at variance with the view counsel have endeavored to impress me with, in regard to this particular transaction, but is quite conclusive upon the value of such evidence. But in no possible view do such transactions prove what could have been realized for these securities upon immediate liquidation, as practically was insisted upon by plaintiff, and, as I think it will appear, the exigencies of her case demanded. There is nothing in proof here to show that if forced to immediate or speedy sale these assets would have sold for more than the estimated values. It seems to me rather, as Wilson evidently thought, that they would have sold for almost nominal sums, unless the defendants had protected them.

In order to understand whether these representations were made in bad faith, and as bearing upon the still more important question to be finally considered, it is necessary to remember the circumstances under which these negotiations were had. The constitutional convention, during this period, completed its labors. The exciting canvass which preceded its adoption, was conducted and the instrument adopted May 7, 1879. This was about the time the estimates were made by Brown. The negotiations were concluded during the canvass for state and county officers, which followed the adoption of the new constitution in 1879.

It will be seen to have been a very remarkable year for political excitement, and that these negotiations were conducted in the midst of it. No one can be unmindful of the business depression which pervaded the whole country, and, in fact, the commercial world, for a year or two preceding these events; and it hardly needs the testimony of the witnesses, yet to prove to courts the extraordinary political revolution then apparently going on in this state. It is now easy to laugh at the fears then entertained, and to scoff the idea that capitalists were, or capital was affected by it. The panic was real, and none the less so, because we can now see that many fears then entertained were idle. It is true that confidence was soon restored, but this cannot restore fortunes lost. However groundless the fears which destroy markets, while a panic lasts, the result is the same. The misfortune of the plaintiff is that this important transaction was consummated during these gloomy times. Her misfortune, however, must not induce us to judge too harshly those who dealt with her under the same shadow.

May 5th, two days before the adoption of the new constitution, the supreme court of the United States affirmed the validity of the so-called Thurman act, which, however proper in itself, took from the defendants twenty-five per cent of the net earnings of the Central Pacific to secure the government. The Central then was really the source of all income and the foundation of all credit to the defendants. They were heavily in debt. The debt of the Central Pacific was over one hundred millions. The letters of both Huntington and Colton show how they regarded the situation. Colton, in particular, was despondent. He wished to sell the construction plant and build no more until they had money in bank. He talks of staying with the wreck, and was particularly pronounced upon what was called the communistic tendency of the times. Everybody, he said, wants to take something up and put nothing down. Their coffers were full of bonds and stocks, for which there was no market, and their letters indicate that they were carrying their large indebtedness by constantly incurring new debts. Nor was this all. Gloomy as the times were, they could not go out of railroad building.

Their main road, after the Central, extended some hundreds of miles into a desert, and there ended. To render the road valuable, it must be connected with the eastern system of roads. Competition was threatened, and had to be forestalled. The danger from competition is tersely stated by Tevis in his deposition. The value of the assets of the W. D. Co. depended very much upon the completion of these projected roads. Notwithstanding this gloomy condition in 1879, there very soon came what has been called a "boom" in railroad business. In fact, there was an unprecedented demand for railroad securities, and all at once, as it were, the defendants found themselves in a prosperous condition. There had been, perhaps, during 1879 a marked improvement in business in the Atlantic states, but not till 1880 was the effect much felt in California or upon California securities. These are undoubtedly facts, and must not be forgotten in estimating the fairness or morality of this transaction. The compromise was made at the darkest period of this depression, when matters in California were most uncertain. These same facts are also material in determining the condition of the plaintiff, and should be kept constantly in view in what will be said hereafter as to the necessities which compelled the compromise on her part.

As to the alleged threats, the evidence does not sustain the allegations. There was no threat to attack the reputation of Colton. Wilson said they merely presented their claims, and, of course, unless settled, they would be presented to the executrix and filed. Then, he believed, they would be made public. If this were so, it would still be the privilege, and, under the circumstances, I think, the duty, of the defendants to present their claim duly verified. This would have been a lawful act. There was no duress, and could have been neither duress nor menace, as defined in the

code. A threat to injure the reputation of her late husband would not come within the purview of the code. Counsel has ingeniously shown that the statute does not apply to dead husbands. But there are no such husbands. The widow is *feme sole*. Of course, it could not have been a case of an attempt to compound a felony or stifle a prosecution. If it constitute any ground of relief, it must be as undue influence. The plaintiff was, no doubt, extremely desirous of preventing the publication of these charges, and the settlement was made under the expectation that thereby the matter would be hushed up. It did not, however, constitute a part of the agreement; and I find no evidence that the defendants ever attempted to use this desire to influence the plaintiff. The fears seem to have been suggested to plaintiff from the fact that they asserted the claim. I have said that they were justified in making claim to this alleged indebtedness.

Nor do I believe it constituted the chief or most powerful motive on her part to execute the assailed contract. She was tenderly attached to her husband, and naturally greatly distressed by these accusations. It plainly appears, however, that she fully appreciated the condition of things, and was determined to maintain her rights, so far as possible. The remarkable letter to Mr. Hunt shows her fully aware of the difficulties surrounding her, and, so far as depended upon herself, confident that she was equal to the occasion. There was no sign of weakness or surrender. The same may be said of all of her letters to Wilson, and her conduct and bearing during the negotiations as related by the witnesses. She was anxious, but alert, appreciative and determined.

She feared, apparently, almost from the beginning, that they would not settle fairly with her; she believed they were robbing her; had trumped up the charges against her husband for that purpose, and had manipulated the books to prove the charges. Yet, during the whole period of anxiety and distress, she was vigilant; trying, with Wilson, to find out what she could, not only to refute the charges, but to be able to retire from the business with as much as possible. This last, indeed, from all the testimony save her own, would appear to have been the prevailing and prominent desire. Hence, an expert was not employed to investigate the charges more thoroughly, because, in Wilson's opinion, it would not have much facilitated the settlement if they had been explained.

I think Wilson states the case as strongly as possible, when he says the desire to conceal these charges was an element in the settlement, but not the chief or principal one. It was an element evidently to this extent, that if the matter was to be compromised, it were best to be done before the claims were filed. But neither plaintiff nor Wilson was inclined to sacrifice any material interest to accomplish that result.

Of the other alleged threats, not much need be said; they are not proven. Mrs. Colton was allowed to state that Mr. Wilson told her various things as coming from the defendants, but there was not

even an attempt to complete the chain of proof by evidence that the defendants ever did make such statements to Wilson. The alleged representation that it would be necessary to get at Mr. Colton's interests by lumping, seems to me to have been strictly true. The claim that they ever refused to allow a separate settlement of the account of the R. M. C. & I. Company's claims is not sustained by any proof, and is flatly denied by Wilson.

The subject of the charge of undue influence has been already alluded to, and I have said all I care to say in regard to the charges of misrepresentation against her deceased husband.

The only other claim which can be urged in reference to undue influence or adverse pressure I propose now to state and discuss; as I think this constitutes the gist of the whole case, and presents the real force which induced, or rather compelled, the plaintiff to make the compromise, I will go somewhat into details. In considering this branch of the case, it is necessary always to bear in mind the financial strain which then operated on the defendants; also, that by the death of Mark Hopkins they had been deprived of much financial force,—the W. D. Co. owed the Hopkins estate over four millions of dollars; also, that they believed they had found proof that Colton had been unfaithful to them; that they were further embarrassed by the dividend which had been improperly declared, of a large amount of the assets of that company when it was owing more than sixteen millions of dollars, and had no available assets; that Colton had been allowed to retain his share under the promise that it would be kept, and returned to the company whenever the associates should deem it necessary; that this promise was now frustrated by Colton's death, and these assets were part and parcel of the Colton estate; that Colton owed them and the estate of Mark Hopkins over seven hundred thousand dollars on his promissory note, which was about to become due, and was also secured only by unmarketable stocks; that the defendants were also in a crisis in their affairs, being required at such a gloomy time to expend other millions to maintain their position in the railroad world and prevent competition. These facts must also be remembered to enable us to appreciate the extreme distress and helplessness of Mrs. Colton. Her means were similarly affected by this financial cloud then impending over California railroad affairs, and in some respects her condition was more affected by the panic than theirs. They never lost their confidence in final success. They could hold on and postpone, and to some extent their obligations could wait on their necessities. Their practical possession and absolute control of the properties gave them a great advantage. This was strikingly manifested when, a few months later, they were able to give Speyer & Co. important advantages and guarantees to induce them to buy Southern Pacific bonds.

Colton died suddenly in the prime of life, killed by an accident. His wife was on her way from the East, having been summoned by the news of his peril. He had been busy, almost to the time of his

death, as active manager with the defendants of their many large properties. Perhaps, as manager, he was most active. Necessarily, his affairs were at loose ends. His widow was sole legatee and executrix of his will. She soon found that Colton was personally largely indebted, and that pressing obligations challenged her immediate attention. She employed Jarboe & Harrison, a prominent firm, as attorneys, generally, for the estate; but as to her relations with the defendants and the various corporations under their control, she confided in Samuel M. Wilson. All parties agree that Wilson is an able lawyer, and that he performed the duties he assumed faithfully and well. Precisely when he was employed does not appear. As early, however, as January 15, 1879, he was inquiring of Mr. Charles Crocker for plaintiff in regard to her interests. He was then substantially informed fully of the difficulties in the way of a settlement. He was told of the dividend improperly declared, the large indebtedness of the W. D. Co., the necessity that its accounts should be settled before Colton's interest could be known. Also, of the charges against Colton, which were then, however, undergoing investigation, and were mentioned as matters of doubt. In fact, the whole case of the defendants may be said to have been opened to him. From that day he devoted such time as he could spare from other business to this matter; and after the adjournment of the constitutional convention in March, he devoted a very large portion of his time to this business, up to the settlement. He found it involved in great difficulty. There were the charges of improper appropriations of money against Mr. Colton, which seem at first mainly to have occupied him. There was the outside indebtedness of the estate, exactly how much the evidence does not show, but it could not have been much less than two hundred thousand dollars, due to others than the defendants and their corporations. There was the million-dollar note, which would become due on the fifth of October, then next ensuing, upon which there was due over seven hundred thousand dollars. It was claimed that the assets of the W. D. Co. would not pay its debts within some six millions. Colton's share of the deficit would be about six hundred and sixty-six thousand six hundred and sixty-six dollars. The charges against Colton afterward set out in Exhibit D amounted to some two hundred and seven thousand dollaas. He found the assets of the estate to be: On deposit with the W. D. Co., four hundred and twenty-nine thousand dollars; a residence assumed to be worth two hundred thousand dollars; a ranch worth fifty thousand dollars, and some other matters probably of little importance. There was also Colton's share of the stock and bond dividend of uncertain value, but entirely unmarketable. There were the twenty thousand shares of the Central Pacific stock, and an equal amount of Southern Pacific stock pledged to secure the million-dollar note. Also, one thousand eight hundred and fifteen shares of the R. M. C. I. stock, said to be worth par, or one hundred and eighty-one thousand five hundred dollars. The main solicitude of Mr. Wilson, aside from

the charges which were thought to affect the reputation of Colton, was in regard to the seven hundred thousand dollars which would fall due in October. He made inquiries in regard to the available means of the estate, and came to the conclusion that she could not possibly meet the payment due on this note; that the stock pledged to secure it was not marketable, and if sold by the pledgees, would not bring near the amount. He testifies: "I believed if these gentlemen forclosed the pledge of forty thousand shares of stock, which they held to secure the balance due on the million-dollar note, they would acquire that stock, with a very large sum unpaid—over half a million of dollars, probably—fully half a million of dollars." He also thought they might wind up the W. D. Co.'s affairs and bring Mrs. Colton largely in debt there.

He frequently conversed with Mrs. Colton about this probable result, and explained to her the difficulty of meeting this obligation, and its probable consequences.

Soon after her husband's death, Mrs. Colton had resolved to get what she had out of the railroad business, if possible; and after this showing, no doubt, she realized the absolute necessity of doing so, or rather, she realized that she was in the power of the defendants—that if they insisted upon a speedy settlement, it would involve her husband's estate in insolvency. The defendants were fully aware of the helpless condition of the plaintiff. The answer avers as a reason for not presenting their claims against Colton's estate that they were repeatedly urged by Wilson and Tevis to desist from so presenting them, and make an amicable adjustment; for, if they asserted their legal rights, they would not only leave Mrs. Colton without property, but would expose the memory of her husband to disgrace. Crocker said they figured that the Western Development Company had not sufficient assets to pay its debts, if it had to be wound up immediately; that it would require a great many years of handling these securities, and to nurse them and bring them before the public. If forced on the market, they would not bring much, if anything. Nobody knew anything about them, and there were millions of these bonds and stocks, and no man would buy except at a low price. They were satisfied that if they were forced to settle these affairs, it would sweep everything she had in the estate. She had not money enough to meet her share of the debts, and there was no other way but a lump settlement.

Now, it being thus manifest to every one, that Mrs. Colton was unable to go on with the defendants, and pay her indebtedness, that not to settle was financial ruin, it was only natural that Mrs. Colton should use her utmost endeavor to retire from the business with a definite sum of money, entirely freed from the responsibilities and complications of the hazardous and uncertain business in which they were engaged. All parties, I think, fully understood the situation. The defendants believed, threatening as the aspect of affairs then was, that they could successfully ride the storm, and that the plaintiff could not pay up and go on with them; that her only

chance was compromise. Wilson, as stated, at first applied himself mostly to the charges against Colton. These involved the reputation of his dead friend, and would be used, he thought, by the defendants as an excuse for not dealing liberally with the widow of their late associate. They would use it as a reason for standing on their legal rights, and thereby would render Colton's estate insolvent. In this examination he was able to explain some items of the charge, but generally his investigations turned out adversely. He spent several months in his examination of the affairs of the various corporations, but was evidently paralyzed with the thought that it mattered but little what he discovered, unless the defendants would relent, and recede from the position they had taken. He constantly insisted upon a settlement. He admitted that she was unable to pay the maturing obligations and continue in the business; that she was unable to make the deposit with the W. D. Company, which would pay her share of the claimed deficit. This aspect of the case must not be overlooked in judging the conduct of the parties. Mrs. Colton sought the contract. Her agents or counsel seem to have taken the position that the defendants were bound, for some reason, to pay her for her interests, and let her go. The defendants, on the other hand, always took the position that they did not wish to buy her out. No just settlement could be made, short of a legal settlement. The affairs of the W. D. Company must, they claimed, be settled and liquidated. Let her pay her note and contribute her share toward the indebtedness of the W. D. Company, and they would manage everything as well as they could, and Mrs. Colton should have her full share. They all knew that this was impossible. Stanford testifies that Wilson told him she was not able to pay the balance of the million-dollar note, and was unable to find any one able and willing to advance the money. Wilson frequently argued with them as to the value of the assets, and insisted that they ought not to stand upon their legal rights, but give her a liberal sum; that whatever the present value of the securities, they knew that ultimately, when their railroads were completed, they would get more for them. The defendants, in effect, said: "Very likely; then let Mrs. Colton pay up, and we will do as well for her as for ourselves." And when reply was made: "You know she can't do that, and must sell, and is willing to take less than the real value," it was replied: "Then, if she cannot meet her obligations, and must sell now, the values are matters of pure speculation." Mr. Huntington arrived in California, July 15th. The next day after his arrival, Mr. Wilson urged him for a compromise. He was promptly told that it was of no use. Huntington did not wish to increase his interests in California. They had all they wanted to do, and would much rather she would keep her interest, pay the debts of the Western Development Company and square the other accounts, and if there was anything left, let it be settled in that way. Finally, however, if she insisted upon going out, or was unable to stay in, they would settle on certain terms. These terms were not at all admissible, and were

promptly rejected. Wilson was, however, now in despair. 'Twas idle to think really of litigation. They could not defend against the million-dollar note. It would soon be due, and, to enforce that, he thought, meant the insolvency of his client. He expressed his feelings in a letter to Mrs. Colton, August 19th:

"They stand very fixed on their first proposition. They would not listen to mine of one million of dollars, as we determined. They seem relentless, immovable and inexorable. I am sorely puzzled; but we need have no immediate fear of anything being done by them; not at least for ten days. In the meantime we must clearly count on our strength and calculate the risk, and trace out all results to their possible end. * * * They ever refuse arbitration; they assume that they know values better than all others, and evidently feel that they are masters of the situation."

He says he meant by this "they would not advance a dollar on their proposition which I have related, and said that that was their ultimatum, and they would not give any more, and satisfied me at the time that that was an ultimatum with them; that it was not said for effect, but was a matter for me to accept it or not; that that was the end of the negotiation with me. It was stated that Mrs. Colton might go ahead and fulfill her contracts—they would prefer she would do so." He says also it had been mentioned several times in their later negotiations that they did not care to buy her out. They would do it at certain prices, but would prefer that she should go on and meet her obligations, and be enabled to meet her advances for the needs of building railroads if they would be called for from time to time. They had not money to pay out; they wanted money.

Further he says: "I felt to a considerable extent that I had not accomplished what I hoped to accomplish, and things looked disastrous and bad; and my inference was that they stood upon their values they had fixed to the different pieces of property which was before us—the Western Development Company, the railroad company, etc.; that they knew values better than other people. They felt that they were independent of our accepting the proposition; that we could accept it or not as we pleased."

This shows, I think, very clearly the point at issue between the parties, and also the precise figure the estimates of values cut in the negotiations. The plaintiff all the time insisted upon a lump settlement, a settlement without liquidating the affairs of the W. D. Co., a settlement before the maturity of the note in October. The defendants, whether sincerely or not, assumed all the way through they did not wish to settle or buy her out. They pretended, at all events, that they preferred a legal settlement. Let the W. D. Co. go into liquidation, or let Mrs. Colton pay the note and advance enough to pay her share of the claimed deficit in the W. D. Co. If you insist on our buying you out, however, we will only do it on this basis. We believe these estimates of value are fair, and we think we know their value better than any one; but if you think differently, pay up, and we will give you the benefit of whatever may

hereafter be realized. We prefer that you should keep them and pay your debts.

From Wilson's point of view it was evident that now he was at the point of surrender. But he resolved to make one more effort. Other counselors were brought in, and with their concurrence and the consent of Mrs. Colton, Tevis was employed; evidently not as an adviser, although Wilson thereby, no doubt, had the benefit of Mr. Tevis's knowledge of stocks and values. He was an able negotiator. He was known as a bold, enterprising and successful speculator. He was intimately acquainted with the railroads, and was a man of great wealth, abundantly able to pick up the burden where Colton had dropped it, and carry it along without asking any favors from the defendants. It was something, apparently, that such a man should learn of such opportunities. At all events, Mr. Tevis undertook the matter, and Wilson had the benefit of his knowledge and judgment, as well as his influence and active aid. With Tevis the same style of negotiations continued. He merely tried to persuade them from their values and induce them to be generous, in view of probable gains through increase in market values, or to alarm them with the prospect of long litigation, which would embarrass them and injure the standing of the securities. In his evidence he relates his interview with defendants. After a forcible and plausible argument in regard to the charges against Colton, he proceeds:

"Beginning with the Southern Pacific Railroad, and going on through the various lists of items, I undertook to use the best arguments that suggested themselves to me to enhance the value of these securities. I insisted that, though they claimed the Southern Pacific bonds were worth only sixty cents on the dollar, that under their administration and what they would do, and the connecting roads they would build, the fact that it was leased to the Central Pacific for a sum of money which enabled them, with the earnings of the road, to pay the interest upon the bonds, that they would ultimately find it for their interest to make them par. That it was a very large sum of money. That, controlling the Central Pacific, they had it in their power to continue to pay interest upon these bonds; that everything in the country was now depressed; that there was no market for anything, and when a market existed they would not only get a better price for the bonds, but they would undoubtedly in the end be able to create a market for the various stocks. Upon my theory, as presented to these gentlemen for the purposes of the negotiations, the assets of the Western Development Company were made to pay its debts, and legitimately, as I contended, left in the hands of Mrs. Colton the dividend that had been declared. * * *

"They, of course, in reply, insisted that my estimates were entirely in advance of actual values. That this was a fair valuation of this property; that they were not bound to go on and ultimately make a market for these securities. That other roads were being built in competition with the Central Pacific, and the whole country

was full of gloomy prospects; that under existing circumstances they thought they had placed a fair valuation upon the property; and that it showed, according to their statement, that the Western Development Company was insolvent and they would do nothing. They said they preferred that Mrs. Colton should respond to her obligations; that she should pay what should be found to be due from the estate on the note of a million dollars; that she should pay what should be found to be due from her on the various accounts and that she should contribute what was necessary to carry on the various enterprises in which they were engaged, and they would be satisfied. I insisted that they knew the fact to be that she was comparatively without means for all these various purposes; that it was for her interest to settle, even for a less sum than she would make out of the enterprise, if able to continue it. I also insisted that they could not afford to have this litigation with the estate of one of their associates, David D. Colton, deceased; that it would be eminently prejudicial to themselves, as individuals, and to all the enterprises in which they were engaged; and that that should exercise a large influence upon them in inducing them to make a liberal settlement with a woman; that otherwise it involved a litigation in which private affairs would be more or less exposed, and in which there would be a very minute investigation into all their enterprises of every kind, personally and as companies; and under all the circumstances I confessed a great surprise that they were not willing to make a very liberal concession, even over and above what they thought was right. That in any litigation they might have, undoubtedly the woman would have the sympathies of the public, and in any event it would be very protracted and embarrassing. Therefore, I contended they should concede her the dividend and consent to the proposition which Mr. Wilson had made. We had a great deal of conversation *pro* and *con*. They were very earnest in insisting upon adhering to their values, and were apparently insensible to any appeals, insisting they would not make any concessions whatever."

So he tried them separately, making personal appeals to each.

This is a very graphic and concise showing of the character of the negotiations. I have before quoted a portion to show what weight was given to the estimates of values. It shows as well how both parties appreciated the helplessness of Mrs. Colton, and knew that she had no alternative but a settlement. It shows also the coercive power in the hands of Mrs. Colton, should she select to take the desperate expedient of litigation. It apparently meant ruin to her, but it might also be productive of disaster to them. Staggering as they were already under these heavy burdens, they could not afford this additional weight. Litigation would injure their securities, perhaps prevent their sale, and would embarrass them in many ways. These considerations seem to have been brought home very forcibly by Tevis.

Still, knowing the distress of the plaintiff and her inability to go on with them, they insisted that she should perform her obligations

and go on or go out on the terms proposed. They insisted they were not bound to discount the future of these securities for her, thus giving her the benefit of their contemplated enterprises and the expenditure of more millions. She was not entitled to the profits when she would not share the risks.

Much more testimony might be quoted showing how the parties at the time understood the issues between them and how they regarded the representations made. The defendants finally consented to improve their offer by adding two hundred thousand dollars in Southern Pacific bonds, and this was accepted.

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"Having come to that conclusion, I believed, at the time, unless Mrs. Colton made this settlement, she would be involved in insolvency; and to save her from that, and at the same time to save any public investigation of these charges against Mr. Colton, and the difficulty of proof I saw in the way, while they could make a *prima facie* case and throw the burden on us of explaining them, I believed it would be much better for her to accept the settlement." Afterwards, being asked if the presentations of the claims to the executrix for allowance would not have embarrassed them, and if he did settle then to avoid this, he says:

"This thing had just as well be settled then as afterwards; the time had arrived to say yes or no. Yes ended it; no was litigation. The time had arrived. I had negotiated until I had run myself out. Mr. Tevis was called in. Mr. Tevis, Mr. Huntington and these gentlemen could act quickly or never. There was no sense in the prolongation of it. The time was ripe for yes or no.

"Ques.—And the non-presentation of these claims was a consummation that you desired?

"Ans.—Why, of course, if we could make the settlement why let the case go on the public record? Why let it go abroad, if I could make a settlement? It was time to make a settlement. We made it or did not make it. Why should we delay it?

"Ques.—Well, you had been delaying it for ten months?

"Ans.—And we had all exhausted ourselves over it. I had spent more time over it than I have done in lawsuits where I had gained twenty thousand dollars. I had exhausted myself and tired myself out. I sacrificed my private interests and had worn myself out. I had abused these people to the extremity almost of fighting personally. The thing had ended. There is an end to everything. The time was ripe to consummate it one way or another. I was prepared to take their favorable answer or go into a fight. There was no sense, no object, no purpose in longer delay."

These statements from these two witnesses, both of whom were acting for the plaintiff, constitute most important testimony. They show us, as near as was possible, the parties face to face, and almost lay bare to our view their secret thoughts and motives. They show quite plainly:

That the parties were not acting under the influence of any relation of trust or confidence.

That the valuations were matter of controversy all the way through, and were put forward as a statement favorable to defendants, and, as such, maintained by them and controverted by the plaintiff.

That the charges against Colton affecting his reputation, while deeply regretted and resented by Wilson, were always held as subordinate to the main question of the interest of plaintiff.

That in the judgment of Wilson there had been sufficient investigation of the affairs of the corporations, and that he, therefore, did not care for further time.

That he was thoroughly convinced that she could not discharge Colton's obligations and go on with the railroad business, and therefore must compromise on some terms or become insolvent.

That the defendants well knew her inability to pay up or go on; yet, when importuned for a settlement and to purchase her interest, always took the ground that they did not wish to compromise or buy her out, but insisted that she should pay up and contribute her share, but indicated a willingness to buy her out at certain prices and on certain terms, believing that her refusal to comply with their terms meant insolvency for her.

Also, that it was understood that if Mrs. Colton were to take the desperate alternative of refusing to compromise on their terms, while it meant certain ruin to her it also meant great loss to them; far short of ruin, probably, yet so great and certain as to cause us to doubt, not to use a stronger word, the sincerity of their oft-repeated protestations that they did not wish to buy her out.

It also shows that it was then anticipated by both parties that if the defendants could ride the storm, as it was confidently believed they could, and hold on for brighter days, they could and would realize much more for the assets of the W. D. Co. than they were valued at in Exhibit E.

Now, the question arises, if these are the true facts, and the plaintiff was induced, or rather compelled, to execute the impeached contract by the stress of the circumstances I have mentioned, does it make a case of undue influence or adverse pressure, which renders it optional with the plaintiff to rescind? The circumstances are certainly capable of being stated in such a way as to have a very ugly look for the defendants.

It may be said that they were insincere when they pretended they did not wish to purchase her interest, and that they abstained from other pressure because they knew that her necessities made them masters of the situation. That their indifference was assumed to drive her to despair and absolute surrender, knowing that she could but realize that litigation at that time meant insolvency for her. However valuable her stock in the various corporations and the bonds obtained under the dividend might really be, if she were able to hold them, they knew that she could not hold them, but must surrender them to pay her indebtedness to themselves at any price they chose to fix for them; or, in other words, although her property might possess great value, yet as no one would buy it or loan upon it, because it had no market value, and also because its future value would depend largely upon their future management, a purchaser not having really a voice in its management, because of the agreement between themselves to act together, therefore, she was completely at their mercy. That they did purchase at their own terms, and within a few months were able to realize a profit of many hundred per cent upon the trade. Notwithstanding her known distress and inability to discharge Colton's obligations, they stood upon their cold rights as the alternative to their offer; and counsel has used, with reference to this

situation, most expressive language, when he says: "'Tis Arctic weather when Huntington stands on his cold rights."

I know, of course, that the situation may be very differently stated; but I have sought to show the circumstances of alleged oppression as strongly for the plaintiff as possible. Now, if the legal positions assumed by plaintiff's counsel be in all respects sustained, and the relation of the parties be held to be fiduciary, it may be that these circumstances would, of themselves, authorize a rescission of the contract; but, unless there did exist some such relation, cold rights are controlling matters in courts of justice. It seems to me the simple question is, did they take grossly oppressive and unfair advantages of her necessities or distress; there was no weakness, at least no mental weakness, on the part of plaintiff. She did not rely upon the defendants. She did not think that she had a right to rely upon them as her trustees; and she knew that the terms proposed were unfair and oppressive. She believed they were robbing her. She had able and faithful advisers; there was no concealment or lack of disclosure, and no misrepresentation, save with reference to the one hundred and sixty-eight shares of R. M. C. & I. stock, of which I have spoken. There were no threats which could or did induce her to execute the contract. It becomes very necessary to inquire whether there was gross inadequacy of consideration for the compromise.

Here, as I have already had occasion several times to repeat, it is very difficult to judge the transaction, as should be done, as matters then stood. It is very difficult to consider the question without, to some extent, regarding it in the light of after events. It requires a great effort to place ourselves in the position the parties then occupied, and look upon the prospects and possibilities and uncertainties, as they did, and in reason must have regarded them. We are prone to hold the defendants responsible for the gift of prophecy.

The properties are all of a class that are very fluctuating and uncertain in their values, even after a market value has been ascertained by actual sales. This is strikingly shown here from the fact that Central Pacific stock at one time, as shown by the evidence, was selling at such a rate that the defendants could then apparently have realized a profit on the twenty thousand shares of Central alone, which belonged to Colton's estate, after paying the note of about three-quarters of a million of dollars. Wilson, after making inquiries, concluded that if this stock were then sold, together with an equal amount of Southern Pacific stock, it would lack at least a half million of paying the note. Before the trial closed, it was stated in court that it was again selling at a rate which would have left a deficit on the note. Indeed, while the case was on trial, June 27, 1884, the plaintiff presented to the court her affidavit to the effect that the defendants were on the brink of insolvency, notwithstanding the great values attributed to these securities, and without apparent reverse or disaster, except the existence of one of those

panics which seem almost periodically to convulse the commercial world.

But it is interesting on this question of adequacy to inquire how a market was made for these securities. The most important item of this species of property consisted of Southern Pacific bonds. The plaintiff claims they were worth ninety cents, because they were taken at that rate by defendants themselves from themselves, to pay their own debts to the sinking fund, and because of a few sales now and then, at least apparently, on the stock board. Yet, a few weeks before Colton's death, he consented to let the W. D. Co. offer Stanford sixty-five cents for the three million dollars of them. It is impossible that they should have offered Stanford less than market value, if it had any, or much less than the value which the parties themselves deemed then a fair price. If there had been a market value of ninety cents, it would be equally absurd to suppose they would have made the arrangement they did with Speyer & Co. There had been some talk with Speyer & Co. before the compromise about undertaking to sell these bonds, but no definite arrangement was made until long after. It was said that Speyer & Co. stood so well with investors that any security they undertook to sell found purchasers. The defendants had long been endeavoring to induce this firm to undertake the sale of these bonds, but did not succeed until January 28, 1880. By that time the new constitution had gone into operation and confidence was restored. Speyer & Co. then agreed to purchase one million dollars of these bonds. But to induce them to purchase, the defendants gave them an option of nine millions more at higher fixed rates. This option is shown by testimony of the experts to have had a market value of several hundred thousand dollars. Defendants agreed not to sell for one year any of these bonds to any one except Speyer & Co. Also, to procure a lease from the Central Pacific for five years, which should be extended five years longer, unless in the meantime they made a connection between the Southern Pacific and the eastern system of roads, and that the rentals should continue to be sufficient to pay the interest on the bonds. Nothing could show better than the onerous conditions of this contract how difficult it was, even in the improved condition of the times, to sell these securities; also, the importance to defendants of an early completion of their projected system of railways, so as to connect with the eastern system; and how much the value of what they then had depended upon their ability to go on with these schemes; and it illustrates the dependence of all the values upon the Central Pacific.

And lastly, to repeat, it proves conclusively that at that time these Southern Pacific bonds had not a market value of ninety cents, or even eighty-five cents on the dollar. Of course, the defendants never were able to sell all the securities at the rates they had been able to create for some of them by carefully nursing and manipulating the market. In the beginning they had them all. Their coffers were full of them; and the question was how many the market would take

at remunerative rates. And when these bonds were all sold, it is fair to remember, particularly in view of the guarantee which formed part of the consideration of the compromise, that in a certain sense they were but their own paper. Under our law, as they owned all the stock, they were individually liable for all the bonds. Of course, if the roads were wisely projected and built, they may well have been worth much more than the cost of construction; but, nevertheless, it was a very serious matter to be compelled, in order to gain this profit, to guarantee, in the face of threatened competition, the success of each one of these many railroad enterprises.

But in what way did the defendants use their position as directors or trustees to gain any advantage from, or over, the plaintiff? They were creditors of the estate; it was not unlawful or immoral to collect their debt. From the fear that the debt would be collected came all the apprehensions of Wilson. That alone would involve the estate in insolvency. The apprehensions of Wilson and the plaintiff were caused by their knowledge of the situation. No act of the defendants induced these fears, unless the representations as to values may have had that effect; and that matter I have sufficiently discussed. There was no threat in regard to the collection of the note.

The most that could be claimed on this score from the evidence is, that when told that she could not meet the maturing obligations, they still expressed a wish to have the debt paid. It is said that if they permitted the impression to exist and to have its weight, it is the same in effect as though caused by them. In some cases this may be so, but it cannot be so here. Mrs. Colton, in the beginning, and before any representation had been made or any controversy arose, determined to go out. In this resolution she and her counsel never wavered. They determined that defendants should buy her out for a fixed sum, and that she should be free from all responsibility for indebtedness or complications. The defendants simply said, whether sincere or not, "we don't wish to buy." She and Wilson insisted. Whether the defendants were sincere or not, what right had she to insist after they had declined to deal? I cannot see what difference it can make as to the motive, if the conduct be unexceptionable. As a matter of fact, they did just what they had a right to do. They opened their books to her, directed their employees to afford every aid. They did not urge her to sell. They did not represent to her that she ought to sell. On the contrary, they advised her to retain her property, and promised to do the best they could for her if she would. But I do not see where the wrong would be if they had insisted that their debt be paid. What was there in this relation which could prevent them from insisting that Colton's obligation should be discharged? If the debtor is poor and unable to pay, must the creditor, therefore, refrain from foreclosing the security? They, in effect, finally said: We desire our legal rights, and to have a legal settlement, but, if you are unable to do better, we will do so and so. She had her legal adviser, and was fully informed of her legal rights. It was not the fault of the defendants that Colton had undertaken to carry a burden that was

beyond his strength. This was their misfortune as well as the plaintiff's. To render her property available, required the expenditure of more millions, and the assumption of great responsibilities. The defendants were not bound to do this for her, and she cannot now claim inadequacy of price because she had not been able to obtain profits which she had no right to expect, except by large expenditures and risks.

The real grievance seems to be that they would not buy her out and pay what she considered full value. She assumes all the time that it was their duty to buy, and upon this proposition, to a great extent, the case seems to turn; and on this assumption, or that they were urging her to sell, their conduct is judged. I do not intend to enter minutely into the question as to what the plaintiff received for the property she transferred. It is well to remember, however, that she was not forced to retire from this controversy a pauper. She was, of course, relieved from the immense debts, one of which at least was admitted, and which her assets then seemed insufficient to pay. From the estate, which Wilson thought, and apparently justly thought, would be entirely swept away if the defendants simply refused to buy, she saved, according to the estimate of counsel, which seems reliable, more than five hundred thousand dollars in property, with a guarantee to the extent of the individual estates of all the defendants against the immense liabilities and complications of the railroad business.

Counsel have attempted to belittle this last consideration, but I confess I regard it of very great importance. Her affidavit filed or presented in June, already referred to, shows the risky business they were engaged in, and the evidence demonstrates that Colton walked with them over the same slippery ground. Colton had expressly covenanted to stand with them and share the liabilities which they had incurred for the Contract and Finance Company before he became their assistant. They were individually liable for all the bonds, amounting with the floating debt to perhaps a hundred and fifty millions. Other liabilities to a fearful amount are indicated in the affidavit.

But it is unnecessary to speak of the complications and liabilities of this immense, intricate and hazardous business. Clearly, one could well afford to get out of such business with very much less than the great expectations of profit which were attended with such untold risks. Such perilous business, with its glitter and power, may suit some persons, and the hope it holds out of colossal fortunes may tempt others. The defendants probably delight in these exciting though dangerous ways, "floating," to borrow a somewhat slang expression, "upon the circumstance of the occasion, trusting to the sublimity of luck." But if one of these bold adventurers were to attempt to sell out and retire with his millions, with such a guarantee against the hazards of the expedients by which he had accumulated them, he would find his many millions in expectancy, and not a few of those apparently in hand, vanishing like the baseless fabric of a vision. The guarantee will be found the greatest

difficulty. He could not begin to touch, on such terms, the market value.

Taking, therefore, the circumstances of this case, and remembering that the sale was made at a period of unparalleled depression in the prices of every species of property and of very great gloom throughout the business world, and in the fear almost of a communistic uprising in California; that it was a lump settlement of a vast uncertainty, made with full knowledge of both sides; that the subject matter was of most uncertain value, depending upon future events, of which each party undertook to judge for himself; and particularly that the defendants assented after repeated importunities of the plaintiff, I must decline to find that the consideration was inadequate. The plaintiff had competent and faithful advisers. They had examined the condition for months. Every avenue of information was thrown open to them. They did examine for themselves. It does not prove inadequacy if afterwards, when business generally had improved, that they were able to make great gains from the property, especially when these gains were in great part the result of further large expenditures and risks on the part of defendants.

My attention has been called to an alleged difference between section 2,228 of the civil code, in regard to the conduct of trustees, and section 1,568, in regard to frauds. In matters of trust it is said that the slightest misrepresentation or adverse pressure is prohibited, while in cases of fraud it must appear, to warrant relief, that the consent would not have been given but for the fraud, undue influence, etc. But I see no difference. True, by section 2,228, it may be claimed that the slightest misconduct is forbidden; but it only forbids, in terms, the trustee to gain an advantage by such means. This puts it on the same plane, as no doubt it was intended to be, with section 1,568. The question here, too, is, did he gain the advantage by the use of adverse pressure?

I may as well say here, that I do not at all accept the proposition that Wilson was ignorant of any fact or circumstance from which attorneys now seek to show a fiduciary relation between Colton and his associates. He had been intimate with the management of these railroad enterprises almost from their inception. For years he had been the regular retained legal adviser of all the corporations and of the associates in their management of them, including the Contract and Finance Company and the Western Development Company. He speaks in his testimony of what he had always understood with reference to those companies. Counsel delight to compare his intimacy with Colton to the friendship between David and Jonathan. When Colton entered upon the discharge of new duties in these important affairs, Wilson was already familiar with the manner of doing business, and was Colton's *alter ego*. Colton had a right to confide all these matters to Wilson, for Wilson was then the confidential adviser with reference to all the business, with a salary larger even than Colton's. He knew how they transacted their business, and that they were co-operating with each other to get control of a system of roads.

I have expressed my belief that he knew of the agreement under which Colton was allowed to retain his share of the dividend which he had caused to be improperly made. Indeed, the compromise itself shows that all parties thoroughly understood the relation of the defendants to these various corporations. It takes for granted the extent of defendants' interest and control. Wilson could hardly have taken the first step in finding out Colton's interests, without discovering the relations.

There would have been no sense even in attempting to obtain a settlement with the individual defendants, or insisting upon their buying her out, unless he already knew of their association and peculiar relation. The whole proceeding in regard to the negotiation seems absurd if Wilson did not know of other relations between the parties than the ordinary relations of stockholders in the same corporation.

And then Wilson testifies that he looked up the question of the effect the death of a co-adventurer would have upon the right of his estate to the fruits of incomplete ventures, his contribution being largely personal service. He satisfied himself that Colton's rights were not lost because he died before the end of the period for which they had contracted to co-operate in these enterprises.

He speaks of the associates as partners, as members of a firm; and Mrs. Colton represents him as saying one partner could not steal from the other. Contract A was in his hands, and of course he knew of the pledge of stock and the terms, including the right to draw out a proportion, as payments should be made on the note. Certainly Wilson did know all the facts which could evidence a fiduciary relation between the parties.

There was, however, a misrepresentation in regard to the four hundred and eight shares of the R. M. C. & I. Company's stock, to the extent of one hundred and sixty-eight shares, valued at sixteen thousand eight hundred dollars. I am not sure that this matter might not be adjusted without interfering with the contract of compromise. This is the only part of the whole transaction, apparently, which the parties supposed they were settling on accurate knowledge. There are, I think, some precedents which would justify the court in rectifying this mistake without disturbing the compromise in either respect; but at all events, it seems to me plain that this is not sufficient to justify a decree of cancellation of a compromise of these large claims. It is impossible to find this to have been an intentional misstatement. In most respects, the legal effect, if it be only an unwarranted assertion of a fact, which turns out not to be true, is the same. Still they are not in all respects the same.

An unwarranted assertion, believed to be true, though on insufficient grounds, and which actually misleads, cannot characterize a transaction as a deliberate fraud. I think the defendants believed themselves masters of the situation on other grounds, and for this, if not for better reasons, disdained to mislead, deceive or conceal.

The misrepresentation caused a loss to Mrs. Colton of sixteen thousand eight hundred dollars. Perhaps her situation was such,

however, at the time, that Wilson concluded that it would do no good unless he could satisfactorily explain away charges of appropriating one hundred and eighty-one thousand dollars. In comparison with these figures, the sum involved in this unwarranted assertion is small. But I think, on general principles, in a matter of such magnitude as this, such a mistake or misrepresentation would not justify setting aside the agreement; especially where, as here, expenditures have been made by the defendants, on the faith of the agreement, which have materially enhanced the value of the property involved in the litigation.

The main fact, after all, is the unfortunate time in which the compromise was made, and the better times which came so soon afterward. Really, I can find no other discovery which has been made by the plaintiff since the compromise, calculated to show the unfairness of that transaction. It seems hard to think that they made, or might have made, so much out of it, in so short a time; profits which possibly she might have realized could she have held on a few months longer. Concerning this, however, I have already said enough.

The power to cancel a contract is a most extraordinary power. It is one which should be exercised with great caution, nay, I may say, with great reluctance, unless in a clear case. A too free use of this power would render all business uncertain, and, as has been said, make the length of a chancellor's foot the measure of individual rights. The greatest liberty of making contracts is essential to the business interests of the country.

In general, parties must look out for themselves. Each is supposed to know what is best for himself, and neither will be released on this proceeding entirely because one party has judged rightly, or chosen more fortunately than the other. It is an every-day occurrence, too, that people in straightened circumstances are compelled to sell at a disadvantage, or to forego the profits of enterprises which they have undertaken without the means of completing.

In accordance with the views I have reached in this case, of the relations of the parties to each other at the time of the impeached transaction, and of the law applicable to that relation, judgment must be entered for defendants, though, if the plaintiff be found correct in regard to the law of trusts, judgment on the findings may probably be entered for her without further trial in the appellate court.

There are still a great many points in the case on which I have not touched. The conclusions to which I have come renders it unnecessary to inquire whether the parties could not be placed in the position they could have occupied had the compromise not been made; or whether, for other reasons, it would now be inequitable to cancel the compromise agreement. Much that has been said, however, has a bearing upon that question; and I end, as I commenced, by expressing my satisfaction in the conviction that all questions involved, both of law and of fact, can be fully considered in the supreme court.

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1. INSTRUCTION ON THE LAW AS TO ACCESSARIES BEFORE THE FACT held to be supported by the evidence. *Minich* v. *People.* *Col.*, 580.

ACCOUNTING.

1. EVIDENCE—SETTLEMENT OF ACCOUNTS.—A settlement between the parties is *prima facie* to be taken as a settlement of all demands, but is not conclusive, and is no bar to a recovery for matters not included in the settlement, though existing at the time, and evidence to show the exclusion of such matters is admissible. *Normandin* v. *Gratton.* *Or.*, 743.

See ESTATES OF DECEASED PERSONS, 1.

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See MARRIED WOMEN, 1.

ADVERSE POSSESSION.

1. COLOR OF TITLE DEFINED—VOID SHERIFF'S DEED MAY GIVE.—Color of title is an apparent title, founded upon a written instrument, such as a deed, levy of execution, decree of court, or the like. To give color of title, the conveyance must be good in form, contain a description of the property, profess to convey the title, and be duly executed. A sheriff's deed, containing these requirements, will give color of title, although in fact invalid, and insufficient to pass the title, or actually void, because founded on a void judgment, or voidable. *Packard* v. *Moss.* *Cal.*, 310.
2. CONVEYANCE BY TENANT IN COMMON—OUSTER—ADVERSE POSSESSION.—If real estate is held in common and one tenant assumes to convey the entire land, and does convey by metes and bounds, his deed will give color of title, and if possession is taken under such deed, the purchaser claiming title to the whole premises, it is an actual ouster, and disseisin of the co-tenant, and possession is adverse, and if continued for a sufficient period will bar the right to recover by the co-tenant. *Id.*
3. WHAT CONSTITUTES COLOR OF TITLE IS A QUESTION OF LAW for the court. The question of occupancy under it is one of fact for the jury. *Id.*
4. CASE IN JUDGMENT.—Defendant took possession of the land immediately after receiving a deed from a tenant in common in December, 1864, and went to improving the land and making up the fences; he constructed levees to protect it from overflow; had and claimed the exclusive possession, and received all the rents and profits and paid all taxes thereon; inclosed the land with a fence of posts and boards, most of it five boards high and part four; he moved some of the fences placed there by his grantor in 1862, and repaired the fences, and "put it under good fences;" and had

a conversation with plaintiff soon after purchasing, from which it appeared plaintiff knew of his purchase: *Held*, that defendant entered in possession of the premises under a claim of title, exclusive of other right, founded upon a written instrument, purporting to convey the property, and that such conveyance gave him *color of title* to the premises. That the testimony was sufficient to warrant the jury in finding, as a matter of fact, that defendant had held the land adversely to plaintiff for more than five years next before the commencement of this action. *Id.*

5. STATUTE OF LIMITATIONS—TITLE ACQUIRED FROM UNITED STATES GOVERNMENT.—The statute of limitations does not commence to run against a title, founded upon a certificate of purchase from the state of swamp and overflowed lands, until the same have been certified to the state by the United States government. *Id.*

6. RIGHTS OF ENTRY.—Where a person out of possession has two separate rights of entry, the loss of one by lapse of time, does not impair the other, and if such person acquires a second right he is allowed a new period in which to pursue his remedy, although he has neglected the first. *Id.*

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See PRINCIPAL AND AGENT.

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1. CONTRACT OF AGISTMENT—CONDITION THAT LAND IS FIT FOR GRAZING.—The plaintiff and defendants entered into an agreement whereby the former undertook to agist and pasture the defendants' cattle; the defendant agreed to pasture on the land all the cattle it was capable of grazing, and in no case less than three thousand head, and to herd them at their own cost, and pay the plaintiff one dollar for each head of cattle so pastured: *Held*, that the condition of defendants' agreement was that the land should be "capable of grazing" the cattle; that if not capable of grazing three thousand head of cattle the defendant was not liable to pay the full price for pasturage. *Williams* v. *Miller et al.* *Cal.*, 540.

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See APPEAL, 2, 3, 16.

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AMENDMENT.

1. AMENDMENT OF RECORD AFTER TERM.—A court has power, after the adjournment of the term, to amend the record, so as to show that a party appeared by attorney upon the hearing of a motion. *Carter* v. *Koshland.* *Or.*, 383.

2. JUDGMENT—AMENDMENT AFTER AFFIRMANCE.—Where a judgment is affirmed by the supreme court, and the remittitur filed in the court below, a motion by the appellants, in the lower court, to amend the judgment in material particulars, is properly denied, when such questions could have been presented to the supreme court on the former appeal. *Parker* v. *Bernal et al.* *Cal.*, 316.

3. STATUTE OF LIMITATIONS—PLEA OF—AMENDMENT SETTING UP.—The plea of the statute of limitations is not favored by the courts; and generally, where a party omits to plead the statute, and goes to trial without doing so, although the claim proved against him is clearly barred on its face, he will be deemed to have elected to stand upon the other defenses, and will not be permitted to amend by adding the plea. *Morton* v. *Bartning.* *Cal.*, 570.

4. THE SAME—WHEN AMENDMENT SHOULD BE ALLOWED.—But where a complaint to recover on an alleged written promise is, during the trial, amended so as to allege a

verbal promise, the defendant has a right to amend his answer by setting up the statute of limitations. In such case his application to amend is not addressed to the discretion of the court. Such defense may then be pleaded to the plaintiff's entire cause of action. *Id.*

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APPEAL.

1. NEW TRIAL ON CONTEST OF WILL—ORDER ON IS APPEALABLE.—An order denying a motion for new trial, in a contest for the probate of a will, is an appealable order, under sections 1,714, 1,717, and 963 of the code of civil procedure. *Estate of Doyle*. *Cal.*, 315.
2. APPEAL FROM ORDER AWARDING ALIMONY—AMOUNT OF UNDERTAKING.—On an appeal from an order awarding a designated sum as counsel fees, and alimony, at a specified rate to be paid monthly, an undertaking to stay execution is sufficient, under section 942 of the code of civil procedure, if it be in double the amount of the lump sums and double the amount of the monthly payments for the period of three years. *Sharon* v. *Sharon*. *Cal.*, 351.
3. NOTICE OF—ORDER FOR ALIMONY—SEVERAL APPEALS IN SAME NOTICE.—A notice of appeal from an order directing the payment of alimony and counsel fees, in an action to establish a marriage and for a divorce, is not insufficient because notice of appeal from a judgment between the same parties and in the same case is embraced in the same paper, nor because the appellant, as a measure of precaution, has inserted in the notice a paragraph to the effect that on the appeal from the judgment the supreme court would be asked to review and set aside the order directing the payment of alimony. Such paragraph is surplusage and without injury. *Sharon* v. *Sharon*. *Cal.*, 634.
4. SEVERAL UNDERTAKINGS MAY BE EMBODIED IN SAME INSTRUMENT.—Where there are several appeals in the same transcript there should be an undertaking on appeal for each one of the appeals, and each appeal should be united in the undertaking. In such case, the undertakings on each appeal may be contained in the same instrument, if the objects for which they are executed can be clearly distinguished. *Id.*
5. ONE UNDERTAKING ON APPEAL FROM JUDGMENT AND ORDER DENYING NEW TRIAL. The only exception to the rule that on each appeal there should be a three-hundred dollar undertaking is where there is, in the same notice and transcript, an appeal from the judgment with an appeal from an order denying a new trial. In such case one undertaking on appeal is held sufficient, in consequence of the long and well-settled practice, which the supreme court declines to disturb. *Id.*
6. SEVERAL NOTICES IN SAME INSTRUMENT.—Several notices of appeal may be contained in the same instrument, if such appeals are distinctly designated. *Id.*
7. ONE TRANSCRIPT FOR SEVERAL APPEALS.—Where there are several appeals, one transcript is sufficient for all, if the record upon which each appeal is to be heard is as clearly distinct as if set forth in separate transcripts for each. *Id.*
8. UNDERTAKING ON APPEAL—POWER OF COURT TO ENTER JUDGMENT AGAINST SURETY. Where a person signs an undertaking on appeal he makes himself a party to the proceeding, and the court thereby acquires such jurisdiction over him in the case that, by force of the statute, it can enter a judgment against him. To warrant the exercise of such power all the conditions necessary for its existence, under the law of its creation, must have arisen. But a mere informality in the undertaking will not destroy the power if it can be discovered therefrom what the surety has undertaken to do. *Dronilhat* v. *Schmidt et al.* *Or.*, 653.
9. UNDERTAKING MUST BE EXECUTED BY APPELLANT.—The provision of the statute requiring the appellant, on appeal from the justice's court, to give an undertaking, "with one or more sureties," must be construed as intending such undertaking to be executed by the appellant. If not, the conditions of the statutory undertaking are not complied with, and the court has no power to render judgment against a surety thereon. *Id.*
10. FAILURE OF SURETY TO QUALIFY.—The fact that a surety on such undertaking neglects to make the requisite affidavit, showing that he was qualified to become such surety, cannot be taken advantage of by him to defeat his liability on the undertaking. *Id.*

11. UNDERTAKING MUST BE FILED AFTER SERVICE OF NOTICE.—Under section 940 of the code of civil procedure, an appeal is ineffectual if the undertaking thereon be filed before the service of the notice of appeal. *Little* v. *Jacks.* *Cal.*, 432.

12. APPEAL FROM ORDER—BILL OF EXCEPTIONS CANNOT CONTRADICT RECORD.—An order appealed from, is a part of the record; and to it alone can the supreme court look for information as to what was ordered by the lower court. Such order cannot be contradicted by anything contained in a bill of exceptions. *Kirkpatrick* v. *Wheeler.* *Col.*, 258.

13. THE SAME—UNDERTAKING MUST DESCRIBE ORDER.—An undertaking on an appeal from an order, which does not correctly describe the order, as it is incorporated in the record, is insufficient to perfect the appeal. *Id.*

14. APPEALS UNDER ACT OF 1885—BOND, WHEN REQUIRED—DUTY OF TRIAL COURT AS TO APPEALS.—Under the act of 1885, Sess. Laws, 350, regulating appeals to the supreme court, no bond is required in taking an appeal unless a stay of the judgment or order appealed from is desired; and neither the trial court nor judge has any function to perform in connection with the appeal, except when called upon by either party litigant to fix the amount of the bond for the stay of proceedings. The provision authorizing the judge under such circumstances to fix the bond is directory, and not mandatory. *Daniels* v. *Miller, Clerk of District Court.* *Col.*, 594.

15. THE SAME—TRIAL COURT CANNOT DETERMINE APPEALABILITY OF ORDER.—Under such statute the trial court or judge has no authority to determine, for the purpose of preventing an appeal, that a given judgment or order rendered or made by such court or judge is not appealable. The power to determine whether an appeal will lie from a given order or decree is vested solely in the supreme court. *Id.*

16. THE SAME—ORDER FOR ALIMONY—STAY OF PENDING APPEAL—APPROVAL OF BOND BY CLERK—MANDAMUS.—One against whom an order for the payment of alimony and counsel fees has been rendered has the right, under such statute, to have the execution thereof stayed, pending an appeal therefrom, upon filing a stay bond. It is not necessary to the approval of such bond, or to its efficacy in operating as a stay, that the amount thereof should have been first fixed by the trial judge; and the action of such judge, in refusing to fix the amount of such bond for the reason, as expressed by him, that no appeal could be taken from the order, will not authorize the clerk of the district court to withhold his approval of said bond. If the clerk refuses his approval for such reason, he may be compelled by *mandamus* to give his approval. *Id.*

17. PROCEDURE ON APPEAL—PRESENT AND FORMER STATUTE.—The distinctions and differences between the procedure on appeal under such statute, and that under the former statute, pointed out and discussed. *Id.*

18. APPEALS UNDER ACT OF 1885—TRANSCRIPT, WHAT TO CONTAIN—AUTHENTICATION OF.—In an appeal, in an action at law, taken under the act of 1885, the papers required to be embodied in the transcript, by section 9, are copies of the order or judgment appealed from or the part thereof mentioned in the notice, a copy of the notice of appeal, and a copy of the appeal bond if any be filed. The appellant may also order into the transcript other matters; but such extra matters will not be considered by the supreme court unless also included in the abstracts. The cost thereof will in no event be taxed to the appellee; nor will the attempt to incorporate the same be accepted as a ground for extending the time fixed by statute for filing the transcript. Such transcript should be certified by the clerk, under the seal of the court, in the same manner as transcripts in cases upon error. *South Boulder Ditch etc. Co.* v. *Community Ditch etc. Co.* *Col.*, 573.

19. PROPOSED RECORD MUST CONTAIN PLEADINGS.—An appeal will be dismissed if the appellant fails to serve on the attorney of the appellee a copy of the proposed record containing the pleadings and proceedings in the case. *Gonzales* v. *Atchison, Topeka, and Santa Fé R. R. Co.* *N. M.*, 732.

20. VARIANCE BETWEEN PLEADINGS AND PROOFS—OBJECTION CANNOT BE FIRST RAISED ON APPEAL.—Where the complaint states a cause of action in the nature of an *indebitatus assumpsit*, and the answer denies the indebtedness for the cause alleged, "or otherwise," the defendant cannot for the first time in the supreme court, raise the question of variance between the pleadings and the proofs, when no such question was raised in the lower court. *King* v. *De Courcy.* *Col.*, 607.

21. STATEMENT ON APPEAL—DEEDS NEED NOT BE COPIED IN EXTENSO.—Deeds and other muniments of title need not be copied *in extenso* in a statement on appeal. A brief statement of their substance is sufficient when no point is made on the construction of the language used therein. *Albion Con. M. Co.* v. *Richmond M. Co.* *Nev.*, 100.

22. SERVICE OF NOTICE OF APPEAL—WHAT SUFFICIENT.—Where the attorney of the respondent refuses to receive a copy of a notice of appeal, it is a sufficient service if the person making the same, in the presence of such attorney, and in his office, places the the copy on a table in front of the attorney and leaves it there. *Nathan* v. *Sutphen. Cal.*, 539.

23. FILING TRANSCRIPT—EXTENSION OF TIME FOR, BY STIPULATION—DISMISSAL OF APPEAL.—Failure to file the transcript within the time prescribed by the rules of the supreme court, will not warrant a dismissal of the appeal, if, at the time of the motion to dismiss, the appellant offers to file it, and it appears that the parties had, by a stipulation not filed, extended the time for filing to a date beyond the hearing of the motion. *Poupion* v. *Muzio. Cal.*, 486.

24. APPEAL HELD WITHOUT MERIT. *Easterby* v. *City of Napa. Cal.*, 241.

See CRIMINAL LAW, 6, 7; EMINENT DOMAIN, 2, 15; JUSTICE'S COURT, 2, 6–10; NEW TRIAL, 11–13.

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1. ARGUMENT OF COUNSEL MAY BE LIMITED.—Under section 194 of the civil code, the trial court has power to limit the time in which counsel can address the jury to less than two hours. *Hurst* v. *Burnside. Or.*, 446.

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See CRIMINAL LAW, 1–4

ARREST.

1. UNITED STATES MARSHAL—DEFENDANT DESCRIBED BY FICTITIOUS NAME—ARREST.—A United States marshal is justified in making the arrest of a defendant, within his territory, who is described in the warrant by a fictitious name. The marshal assumes only the risk in execution of such a warrant, of arresting the right person. *Williams* v. *Tidball et al. Ariz.*, 1.

2. THE SAME—UNITED STATES COMMISSIONER MAY ISSUE WARRANT FOR OFFENSE COMMITTED OUT OF DISTRICT.—Such marshal is protected and justified in making an arrest by virtue of a warrant issued by a United States commissioner, although the latter did not reside in the judicial district where it was alleged on the face of the warrant and complaint the offense was committed. *Id.*

ASSAULT.

1. ASSAULTING OFFICER OF PENITENTIARY—INDICTMENT.—Under section 677 of the criminal code, an indictment against a convict for assaulting an officer of the penitentiary with a deadly weapon must allege that the defendant knew the person assaulted to be an officer. *State* v. *Smith. Or.*, 520.

2. ASSAULT WITH INTENT TO COMMIT MURDER—ALLEGATIONS OF INFORMATION—MALICE.—An information for the crime of assault with intent to commit murder, which alleges that the defendant committed the act "willfully and with malice aforethought" need not aver that the act was done unlawfully. The allegation of malice implies the unlawfulness of the assault. *People* v. *Ah Toon. Cal.*, 760.

ASSESSMENT.

See CORPORATIONS, 6; TAXATION.

ASSIGNMENT.

1. ASSIGNMENT OF CLAIM—ACTION BY ATTORNEY—CRIMINAL INTENT NOT PRESUMED.—In an action by an attorney, on an assigned claim, in the absence of any pleading on the subject and of evidence showing that the assignment was taken with the intent to bring suit, the court will not presume, from the fact that he is an attorney and has brought suit, that he took the assignment with the criminal intent specified in section 161 of the penal code. *Bulkeley* v. *Bank of California. Cal.*, 212.

2. ORDER ON DEBTOR—ASSIGNMENT OF DEBT PRO TANTO—FRAUD ON CREDITORS.—Orders drawn in favor of a third person by a creditor on his debtor, and accepted by the latter, operate as an assignment of so much of the debt as is represented by them.

Such assignee thereupon becomes a creditor of the debtor, and, as such, may attack a subsequent conveyance by the latter, under section 3439 of the civil code, on the ground of fraud against creditors. *Hobart* v. *Tyrrell. Cal.*, 155.

See CONSIDERATION, 4; INSOLVENCY, 1; MORTGAGE, 4; WAREHOUSEMEN, 1.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

1. ASSIGNMENT FOR BENEFIT OF CREDITORS—FRAUD—SETTING ASIDE.—Ordinary contract creditors, who have not reduced their claims to judgment, or proved them under the insolvency act, cannot have a general assignment for the benefit of creditors set aside on the ground that the same is fraudulent as to creditors. *Dawson* v. *Downing et al. Or.*, 437.
2. ASSIGNMENT FOR BENEFIT OF CREDITORS—CHANGE OF POSSESSION—LIEN OF ATTACHING CREDITOR WITHOUT NOTICE.—Under section 1523 of the general statutes an assignment of personal property for the benefit of creditors, unless accompanied by an actual and continued change of possession, does not pass the title to the assignee, as against a *bona fide* creditor without notice of the assignment. If, therefore, a creditor, without notice, levies an attachment or execution upon the property, before the assignee has secured possession thereof, he obtains a lien, to which the title of the assignee is subject. *Ray* v. *Raynolds. Col.*, 614.

See PARTNERSHIP, 3.

ATTACHMENT.

1. ATTACHMENT PROCEEDINGS ARE STATUTORY, and unless the statute is strictly pursued, no right is acquired under them. *Schneider* v. *Sears. Or.*, 440.
2. ATTACHMENT OF PERSONAL PROPERTY HOW MADE.—Under section 147 of the civil code, personal property capable of manual delivery to the sheriff and not in the possession of a third person, is attached by taking it into custody; other personal property by leaving a certified copy of the writ and a notice specifying the property attached. As to such latter property, it is not sufficient to merely post a copy of the attachment on the property claimed. *Id.*
3. THE SAME—EXPENSES OF SHERIFF IN KEEPING PROPERTY.—A sheriff is entitled to be paid for the neeessary expenses incurred by him in taking care of and preserving property attached. The reasonableness of such charges should be determined by the court. *Id.*
4. THE SAME—PROCEEDING TO TRY RIGHT TO PROPERTY ATTACHED.—In a proceeding to try the right of property, taken under attachment, under section 258 of the civil code, the costs and disbursements must be paid by the party against whom the verdict is given, or, if no verdict be given, then by the party who withdrew his claim, or directed the property to be discharged. The costs and disbursements in such proceeding have no connection with the costs and disbursements in the attachment suit. *Id.*
5. ATTACHMENT CANNOT BE ISSUED ON ADMINISTRATOR'S BOND—INSTRUMENT FOR DIRECT PAYMENT DEFINED.—An administrator's bond, given under section 152 of the act relating to wills, is not an instrument for the direct payment of money, within the meaning of section 95, subdivision 14, of the code, regulating the attachments, and no attachment can be issued in an action founded on such bond. A "direct payment," is one which is absolute and unconditional as to time, amount, and the persons by and to whom it is to be made, and a written instrument which provides for such payment is one which expressed those terms fully. *People, for the Use of Bates et al* v. *Boylan et al. (U. S. Cir. Ct.). Col.*, 401.
6. IRREGULARITY IN AFFIDAVIT, DOES NOT INVALIDATE.—An irregularity in an affidavit for an attachment, in failing to contain a statement that the payment of the contract sued upon was not secured by any mortgage or lien upon any real or personal property, or if it was so secured, that the security had become valueless, without any act of the plaintiff or the person to whom such security had been given, does not render the attachment void, so that it can be collaterally attacked by a stranger, but merely voidable at the instance of the attachment debtor. *Scrivner et al* v. *Dietz et al. Cal.*, 163.
7. PRIORITY OF LIEN—MAY BE LOST BY ACTS OF LIENOR.—A prior lien gives a prior claim, which is entitled to prior satisfaction out of the subject it binds, unless the lien be intrinsically defective, or be displaced by some act of the party holding it which shall postpone him in a court of law or equity to a subsequent lien claimant.

Consequently in an action to foreclose a prior mortgage, subsequent attaching creditors are entitled to prove the existence of their attachment liens, and to show that in consequence of the acts of the plaintiff, they are superior to the lien of the plaintiff's mortgage. *Id.*

8. ATTACHING CREDITORS—BONA FIDE PURCHASERS—CHANGE OF POSSESSION ON SALE. As against third persons an attaching creditor is to be regarded as a purchaser in good faith and for a valuable consideration, and in order to defeat his rights, by a prior sale of the property attached, there must be such a change of possession or delivery of the goods as passes the property. *Gill et al* v. *Frank. Or.*, 413.

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ATTORNEY-GENERAL.

1. ATTORNEY-GENERAL—VACANCY IN OFFICE—APPOINTMENT BY GOVERNOR.—The governor of the territory, having power to appoint an attorney-general, during a recess of the legislative council, only in case of a vacancy caused by death or resignation, the supreme court will not presume, in support of an appointment so made, that either of such contingencies have happened, when the person who is claimed to have vacated the office is present in court, and has continuously exercised the functions of his office to the knowledge of the court. *In the Matter of Claim for Recognition as Attorney-general. N. M.*, 734.

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BANKRUPTCY.

1. NO DISCHARGE IN STATE COURT, AFTER REFUSAL IN UNITED STATES DISTRICT COURT.—The jurisdiction acquired by the United States district court in a proceeding in bankruptcy is exclusive. Consequently, an insolvent who has been refused a discharge from his debts, in such court, cannot be discharged from the same debts, in a state court, under the insolvency act of 1880. *In re Smith. Cal.*, 436.
2. DISCHARGE—PRIOR BENEFIT OF ACT.—Under such act no discharge can be granted, if the debtor, in case of voluntary insolvency, has received the benefits of that or any other act of insolvency or bankruptcy within three years next preceding his application for discharge. *Id.*

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See CONSIDERATION, 5.

BONA FIDE PURCHASER.

1. A BONA FIDE PURCHASER is one who purchases, in good faith, an estate for a valuable consideration, actually paid, without notice of a prior equity. *Larkin* v. *S. B. G. M. Co.* (*U. S. Cir. Ct.*). *Cal.*, 50.
2. BURDEN OF PROOF.—The burden rests on the party claiming protection as a *bona fide* purchaser, to prove affirmatively the payment of value, and that the purchase was made without notice of the prior equity. *Id.*

3. CONSIDERATION IN DEED NOT EVIDENCE.—An acknowledgment of payment of consideration in a deed is not evidence of payment of value, as against the owner of the prior equity. *Id.*
4. EVIDENCE OF WANT OF NOTICE.—In such action, where notice by the defendant of the plaintiff's equities is one of the questions at issue, the defendant may testify that at the time he purchased the land he had no knowledge that any portion of it was inclosed by the plaintiff. *Taylor* v. *C. P. R. R. Co.* *Cal.*, 22.
5. POSSESSION OF LAND, WHEN NOTICE.—Possession of land, in order to impart notice of the rights and equities of the holder, must be actual, open, exclusive, notorious, and visible. *Id.*
6. CASE IN JUDGMENT.—The defendant railroad company contracted to sell the land in dispute to the defendant Davis. In an action by the plaintiff to compel the assignment of such contract, the company made default; the defendant Davis answered, and findings and judgment were rendered in his favor: *Held*, that the company was in the attitude of a trustee, holding the legal title for him, and if the plaintiff was not entitled to relief as against him, she was not entitled to enforce a deed from the company. *Id.*

See ATTACHMENT, 8.

BOUNDARIES.

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BURGLARY.

1. EVIDENCE OF CONSPIRACY—ACTS OF CO-DEFENDANT.—In a prosecution for burglary, evidence that on the morning following the night when the burglary was alleged to have been committed, the defendant came into the store of the witness and endeavored to sell him articles similar to those claimed to have been stolen, and that, while the defendant was in the prosecution of that purpose, the witness looked out and saw the co-defendant standing outside, is not sufficient to establish, *prima facie*, a conspiracy between co-defendants, nor is it proper testimony to go to the jury as tending to establish such fact. And the fact that, many days after the alleged burglary, the co-defendants were seen conversing together, is not evidence of such conspiracy. *People* v. *Stevens.* *Cal.*, 321.
2. EVIDENCE HELD TO SHOW THAT THE BURGLARY WAS COMMITTED in the night-time. *Id.*

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See JURY AND JURORS, 1, 2, 5.

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CLAIM AND DELIVERY.

1. JUDGMENT MUST BE IN ALTERNATIVE.—In an action to recover possession of personal property, when the plaintiff recovers a verdict, judgment should be for the possession of the value of the property, and damages, if any are awarded, for its detention. A judgment which is not in such alternative form, as prescribed by section 667 of the code of civil procedure, is erroneous. *Stewart* v. *Taylor.* *Cal.*, 167.
2. VERDICT MUST FIND VALUE OF PROPERTY—COURT CANNOT SUPPLY OMISSION IN VERDICT.—In such action a verdict for the plaintiff should find the value of the property. If it does not, the court should direct the jury to correct their verdict in such particular. If no such correction is made by the jury, the court has no

power to enter judgment for the value of the property, and a judgment so entered will be reversed. *Id.*

3. VERDICT MUST BE COMPLETE AND CERTAIN.—A verdict to serve as a basis for a judgment must be complete and certain, otherwise both the verdict and the judgment entered thereon are erroneous and reversible. *Id.*

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1. PAST ILLICIT COHABITATION—DEFENSE OF MUST BE SPECIALLY PLEADED—FINDINGS. In an action to recover on an agreement in writing for the payment of money, a defense that the agreement was given in consideration of past illicit cohabitation, if relied on by the defendant, must be pleaded by him when the same does not appear in the complaint. If not pleaded, he cannot give evidence that such was the consideration; and a finding thereon is without the issues, and will be disregarded on appeal. *Sharon* v. *Sharon*. *Cal.*, 177.

2. PROMISE TO CEASE ANNOYANCE A SUFFICIENT CONSIDERATION.—A promise by one person to cease to disturb, or annoy, or to make any demands upon another, is a sufficient consideration to support an agreement by the latter to pay money to the former. *Id.*

3. PAROL EVIDENCE OF CONSIDERATION OF DUE BILL.—Parol evidence is admissible to show that the consideration for a due bill was the balance due to the payee, resulting from a transaction in real estate, founded upon a verbal agreement between the maker and the payee. *Bigelow* v. *Scott*. *Wash.*, 192.

4. PROMISSORY NOTE—ASSIGNMENT OF MAIL CONTRACT—CUTTING DOWN ROUTE—FAILURE OF CONSIDERATION—PAROL EVIDENCE INADMISSIBLE TO VARY WRITTEN CONTRACT.—The defendants executed their promissory note in pursuance of a written contract for and in payment of an assignment to them of a governmental contract for carrying the mails, over a route which was, under the existing law, liable at any time to be cut down by the government, with a corresponding reduction of the amount to be paid. The route was cut down, after the assignment, and a corresponding reduction made in the amount of money paid under the mail contract: *Held*, in an action of said note, that the cutting down of the route, and the reduction of the amount paid, did not constitute a partial failure of consideration for the note; and that in the absence of such provision in the written contract for the assignment, parol evidence was inadmissible to show a verbal agreement, at the time the contract was made, whereby the defendants were to be liable, on their note, only for the portion of the route that was continued. *Wells, Fargo, & Co.* v. *Carr et al.* (*U. S Cir. Ct.*). *Cal.*, 127.

5. BILL OF EXCHANGE—PARTIAL FAILURE OF CONSIDERATION—INDORSEE WITH NOTICE. Partial failure of consideration of a bill of exchange may be set up to an action on the bill against an indorsee, before maturity, who had notice thereof. In such action the defendant may recoup his damages, though they be unliquidated. *Davis* v. *Wait*. *Or.*, 79.

6. FINDINGS—WANT OF CONSIDERATION.—Finding that the instrument sued on was without consideration held not supported by the evidence. *Golden State and Miners' Iron Works* v. *Muir*. *Cal.*, 418.

See BONA FIDE PURCHASER; CONTRACT, 9; TRUST, 2.

CONSPIRACY.

1. CONSPIRACY TO OBTAIN LEASE—PLEADING—CANCELLATION.—The complaint charged with particularity of detail, that the defendants formed a conspiracy to cheat and defraud the plaintiff, by inducing him to accept a lease of certain land from one of

them, that they carried out such conspiracy by false and fraudulent representations, which imposed upon the plaintiff, and that plaintiff has been damaged thereby: *Held*, upon a review of the averments of the complaint, that a good cause of action was stated, entitling him to a cancellation of the lease. *Davis* v. *McGrew et al.* *Cal.*, 199.

See BURGLARY, 1.

CONSTITUTIONAL LAW.

1. WHEN ACT SHOULD BE HELD UNCONSTITUTIONAL.—An act of the legislature which is not prohibited by the express words of the constitution, or by necessary implication, ought not to be declared void as in violation of that instrument. It is only in cases where the provisions of the statute manifestly infringe upon the provisions of the constitution that courts are authorized to declare the statute void. *State ex rel. Williams et al.* v. *County Commissioners.* *Nev.*, 706.
2. LOCAL AND SPECIAL LAWS—ACT FIXING COMPENSATION FOR COUNTY OFFICERS.—The prohibition in section 20, article 4, of the constitution, against the passage of local or special laws "for the assessment and collection of taxes for state, county, and township purposes," was only intended to apply to laws regulating the method of assessment and collecting taxes for the purposes of general revenue, and should not be construed as a prohibition upon the power of the legislature to delegate authority to the county commissioners to fix the rate of taxation for county purposes in the several counties. And the act of 1885, "regulating the compensation of county officers in the several counties," does not, and was not intended to, impose a tax for revenue purposes, and consequently is not obnoxious to section 20, article 4, of the constitution. That such was not the intention of the constitutional convention is shown upon a review of the debates in that body in connection with such section. *Id.*
3. THE SAME.—The legislature has power to pass local or special laws regulating the compensation of county officials; and the act of 1885, in so far as it relates to Washoe county, is constitutional. *Id.*
4. SUBJECT OF ACT NOT EXPRESSED IN TITLE—COUNTY WARRANTS.—The provisions of the act of 1885, relating to the purchase of outstanding warrants at their market value, setting aside for a special purpose twenty-five per cent of funds in the treasury, advertising for sealed proposals of sale, and otherwise providing for the disbursement of funds in the county treasury are not germane to the subject expressed in the title to the act entitled "An act to provide for the payment of county and road taxes in coin, and to repeal all laws in conflict therewith." Consequently, such provisions are in conflict with section 21, article 5, of the constitution. The unconstitutionality of such provisions does not invalidate the other portions of the act which are germane to the subject expressed in its title. *People ex rel. Seeley* v. *Hall, Treasurer of Summit County.* *People ex rel. Seeley* v. *May, Treasurer of Lake County.* *Col.*, 617.
5. IMPAIRING OBLIGATION OF CONTRACTS—CONTRACTS BETWEEN MUNICIPALITY AND INDIVIDUAL.—The provision of the United States constitution, prohibiting a state from passing any law impairing the obligation of contracts, applies to a contract between the people acting in a municipal capacity, on the one hand, and a private individual or corporation, on the other. *Id.*
6. RECEIVABILITY OF COUNTY WARRANTS FOR TAXES—LEGISLATURE CANNOT IMPAIR.—Prior to the act of 1885 the general statutes provided that county warrants should be receivable by the treasurer for ordinary county taxes: *Held*, that the right to have such warrants, issued prior to the act of 1885, received in payment of taxes, formed part of the contract evidenced by the same, and that the legislature could not, by subsequent statute, deprive the party to whom the warrant was issued, or his assignee, of such right. To do so would be to impair the obligation of the contract. *Id.*
7. WARRANT FOR WITNESS FEES IN CRIMINAL CASES.—A warrant for fees due for services rendered in attendance upon court by the payee as a witness in a criminal case, issued prior to the act of 1885, in pursuance of the statute authorizing the payment of fees to witnesses in such cases, is the evidence of a valid contract between the payee and the county, the obligation of which the legislature cannot impair by depriving it of its receivability for taxes. *Id.*
8. STATUTES AUTHORIZING WARRANTS TO BE RECEIVED FOR TAXES ARE CONSTITUTIONAL. The statutes authorizing the receipt of county warrants in payment of county taxes, are not unconstitutional; they are not in conflict either with section 7 of article 10 of the constitution, which prohibits the general assembly from imposing taxes for municipal purposes, or with section 28 of article 5, which deprives it of the power

to exchange, transfer, release, postpone, or in any way diminish the liability or obligation of a person to a municipal corporation; or with section 11 of article 2, prohibiting it from granting any irrevocable immunity. *Id.*

9. MUNICIPAL ORDINANCE—GENERAL OPERATION—TREATY OBLIGATIONS.—A municipal regulation which applies alike to all persons engaged in a given pursuit, without distinction as to nationality, residence, age, sex, or condition, is not, when otherwise regular and valid, subject to the criticism of being in violation of treaty obligations existing between the United States and China. *Yick Wo, In re.* *Cal.*, 548.

10. ELECTION OF TRUSTEES—CONSTITUTIONAL LAW—TRUSTEES FOR FIVE YEARS.—The provision of the school law of 1885, declaring that the term of trustees shall be five years in boards of five trustees, is in conflict with the constitutional prohibition declaring that "the legislature shall not create any office the term of which shall be longer than four years." Such being the case, the entire act fails, as it must be presumed that the legislature intended to establish a general plan for the election of school districts throughout the state, and as otherwise two systems would prevail. *State ex rel. Attorney-General* v. *Harris et al.* *Nev.*, 98.

11. POLICE POWER—RIGHTS OF PROPERTY SUBJECT TO—All rights of property are held subject to such reasonable and proper control of the mode of its keeping and use as may be deemed necessary for and in consonance with the welfare of the general public. And in the exercise of the police power vested in the legislature certain kinds of property, when held or used so as to be injurious to the general public, may be seized and destroyed. Under article 4, section 26, of the constitution, sections 319 to 326, inclusive, of the penal code, and order No. 1587 of the board of supervisors of the city and county of San Francisco, such rule has been extended to the sale and possession of lottery-tickets. *Collins* v. *Lean.* *Cal.*, 676.

See DENVER.

CONTEMPT.

1. VIOLATION OF INJUNCTION—OFFICER EXECUTING PROCESS OF SUPREME COURT.—An officer cannot be punished for contempt in violating an injunction of the lower court if he acts under the mandate of the supreme court. *State* v. *Jacobs.* *Or.*, 526.

CONTINUANCE.

1. CRIMINAL LAW—CONTINUANCE OF TRIAL—DEFENDANT WHEN ENTITLED TO—ABSENCE OF WITNESSES.—The refusal, in a criminal case, to grant the defendant a continuance of the trial on account of the absence from the county of witnesses in his behalf is error, when it appears, from the uncontradicted affidavit of the defendant, that such witnesses were reasonably subpœnaed; that the facts, stating them, which the defendant expected to prove by them were material to the defense; that he could not prove the same facts by any other witnesses; and that he expected to be able to procure their attendance if the trial was postponed. *People* v. *Lee.* *Cal.*, 239.

2. CONTINUANCE OF TRIAL—ABSENCE OF WITNESS.—In such case, a refusal to continue the trial on account of the absence of witnesses for the defense is not error, if the officer in whose hands the subpœnas against them had been placed for service was ignorant of their place of residence, and nothing appeared from which the court might infer that their attendance could be procured at any subsequent term of the court. *State* v. *Gray.* *Nev.*, 72.

3. CONTINUANCE OF TRIAL—ABSENCE OF WITNESSES—AFFIDAVIT.—A continuance of a trial on the ground of the absence of witnesses will not be granted if the affidavit on which the motion is based fails to state that there are no other persons by whom the same facts can be proved. *State* v. *Marshall.* *Nev.*, 290.

4. PROCEEDING WITH TRIAL AFTER CONTINUANCE AS TO ONE DEFENDANT—WAIVER OF IRREGULARITY.—Proceeding with a trial as to one defendant, after a continuance has been granted as to another, conceding it to be error, cannot be taken advantage of by the adverse party if he did not object to such mode of procedure before the trial was commenced. *Myers* v. *McDonald.* *Cal.*, 337.

CONTRACT.

1. CONTRACT FOR MANUFACTURING LUMBER.—Under a contract providing for the manufacture of lumber, a clause entitling one party to take "any part of the whole of the refuse lumber that may accumulate by manufacturing," refers to quantity, and not

to quality, and requires that it be taken as a whole, and not culled and picked over for the best pieces. *Waterman et al.* v. *Morrell et al.* *Cal.*, 476.
2. THE CONTRACT SUED ON CONSTRUED, and held that the defendants had complied with the conditions on their part as to payment. *Id.*
3. CONTRACT FOR SALE OF LAND—TENDER OF DEED BY VENDOR.—A vendor, under a contract for the sale of real estate, is entitled to maintain an action at law for the recovery of the purchase-price, if he executes and tenders a deed, at the proper time, and keeps the tender good by bringing the deed into court. *Powell* v. *Dayton, Sheridan, and Grande Ronde R. R. Co.* *Or.*, 380.
4. THE SAME—DESTRUCTION OF SUBJECT-MATTER EXTINGUISHES CONTRACT.—A vendee under such contract is relieved from his obligations, if prior to the time of performance, the property contracted to be sold has been destroyed. *Id.*
5. THE SAME—CONCURRENT CONDITIONS—PERFORMANCE.—A vendor's covenant to convey and a vendee's covenant to purchase, are dependent and concurrent, where the act of each is to be performed at the same time. And a tender of a deed by the former, long after the time stipulated for performance, is not sufficient to sustain an action for the purchase-price. *Id.*
6. AGREEMENT TO CARRY ON BUSINESS CONSTRUED.—Under the agreement mentioned in the opinion, *held*, that the defendant was not bound to carry on the business in question, for any particular time. *Huntington, Administratrix, etc.*, v. *Russell et al.* *Cal.*, 182.
7. AGREEMENT FOR SALE OF MINE CONSTRUED—PAYMENT OF PURCHASE-PRICE—Plaintiff sold to the defendants a mining claim, under an agreement by the terms of which the purchase-price was to be paid out of the net proceeds of the property sold; the agreement provided that if the vendees resold the property, the purchase-price should at once become due and payable. The vendees subsequently entered into an arrangement, the effect of which was to transfer to an adjoining mine-owner a large portion of the property sold: *Held*, after a construction of the contract, that, upon such conveyance by the vendees, the purchase-price became due and payable. *Linn et al.* v. *Butler et al.* *Col.*, 254.
8. CONTRACT OF EMPLOYMENT—AGREEMENT FOR COMPENSATION IN CASE OF DISCHARGE—PUBLIC POLICY.—A provision in a contract of employment, whereby the employers promise to pay the employee, for his time and energies, while employed, even if they should discharge him from their service for derelictions of duty, or inability to carry out their wishes and plans, is not void, because being against public policy. *Edwards* v. *Crepin et al.* *Cal.*, 195.
9. BREACH OF CONTRACT—EVIDENCE OF CONSIDERATION.—Where a promise is made on consideration, *inter alia*, that the plaintiff would not become intoxicated in a certain place and during a certain period, evidence that the plaintiff became intoxicated is admissible in an action by him to recover for breach of such promise. *Myers* v. *McDonald.* *Cal.*, 337.
10. BREACH OF CONTRACT—ALLEGATION IN ANSWER CONSTRUED.—In an action to recover for the breach of a stipulation in an agreement, to the effect that the defendant would not, in the building of a certain mill, "let any sawdust or rubbish be put into the stream so as to injure or prevent the use of the same for plaintiff's family use," an allegation in the answer that the defendant prevented the sawdust and rubbish from being carried down by the stream, and that the waters thereof were not rendered impure, etc., by reason of such sawdust and rubbish, constitutes a valid defense. *Peterson* v. *Hubbard.* *Cal.*, 487.
11. SETTLEMENT AND PAYMENT IN FULL IS A VALID DEFENSE to an action for breach of contract. *Id.*
12. IN SUCH ACTION THE FINDINGS HELD TO COVER THE ISSUE and to be sustained by the evidence. *Id.*

See AGISTMENT, 1; CONSTITUTIONAL LAW, 5, 6; DELIVERY, 1; WAGER.

CONVERSION.

1. MEASURE OF DAMAGES IN ACTION FOR THE CONVERSION OF TIMBER.—An innocent purchaser from a willful trespasser of timber cut on the public land is liable for the value of the timber at the date of such purchase, including the value of all labor and expense which said trespasser had then bestowed upon it. *United States* v. *Heilner, et al.* (*U. S. Cir. Ct.*) *Or.*, 723.
2. CASE IN JUDGMENT.—H. purchased fifty thousand feet of lumber at the mill of E., made from timber willfully cut from the public land by the latter without the knowl-

edge of H., and hauled the same to Baker City, a distance of twenty miles, at a cost of five dollars per thousand, where he disposed of it at fifteen dollars per thousand: *Held*, that in an action by the United States to recover damages for the conversion of said timber, the true measure thereof was the value of the lumber at the mill. *Id.*

3. NEW TRIAL—INTEREST ON VALUE OF PROPERTY CONVERTED.—On the trial it was taken for granted that the lumber was delivered to the defendant at Baker City, and the jury took its value there as the measure of damages; but on a motion for a new trial, it being admitted that the defendant paid for hauling the lumber to that place, and no objection being made to the omission to prove that fact on the trial, a new trial was granted to the defendant, unless the plaintiff would remit the cost of hauling, two hundred and fifty dollars, less one hundred and twenty dollars, the amount of three years' interest on the value of the lumber at the mill, which the plaintiff had omitted to claim on the trial. *Id.*

CONVICTION.

See CRIMINAL LAW, 10, 12, 14–16.

COPYRIGHT.

1. INJUNCTION AGAINST UNLAWFUL PRESENTATION OF OPERA, WHEN ISSUED.—The owner of a literary work, such as an opera, not protected by a copyright, is entitled to an injunction against its unauthorized presentation, upon giving approved security. In such case the right to recover damages for the unlawful production of the opera, is not an adequate remedy. *Goldmark et al.* v. *Kreling et al.* (*U. S. Cir. Ct.*) *Cal.*, 39.
2. THE SAME—PRELIMINARY INJUNCTION—ADDITIONAL SECURITY MAY BE ORDERED. Where a preliminary injunction is granted, upon complainants giving a bond, if counsel for the respondents have not had an opportunity to be present at the approval of the bond, the court, sitting as a court of equity, has power, upon petition, promptly made, or affidavit, showing the sureties to be insufficient, and notice to the other side, without regard to other proceedings, at any proper stage of the case, to require an additional bond to be given, as a condition of the continuance of the injunction. Such application should be promptly made, otherwise the right to object will be deemed waived. *Id.*
3. THE SAME—RIGHT TO INJUNCTION WHEN NOT LOST BY FAILURE TO FURNISH SECURITY IN TIME.—The complainants, as owners, filed a bill to restrain the defendants from unlawfully producing the opera of Nanon. Such opera had never been copyrighted. An order to show cause why an injunction should not be granted, was issued, returnable on a day fixed. After several delays, no cause being shown against it, an injunction was issued, on condition that the complainants give bond in the sum of ten thousand dollars. The bond offered being deemed insufficient by the court, the injunction was dissolved upon the defendants filing an indemnity bond. The complainants thereupon moved to set aside the order dissolving the injunction, at the same time offering a certified check for ten thousand dollars, or an equal amount of coin, as security: *Held*, that such order should be granted; that complainants' right to an injunction was not lost by reason of their failure to funish a sufficient bond in the first instance. *Id.*
4. DISTINCTIONS BETWEEN THE PRESENT CASE AND CASES INVOLVING the infringements of patents and copyrights, so far as the complainants' right to a preliminary injunction is concerned, stated and discussed. *Id.*

CORPORATIONS.

1. STOCKHOLDER'S LIABILITY FOR UNPAID SUBSCRIPTIONS—PRESENTATION OF CLAIM.—The unpaid capital stock of a corporation is regarded in equity as a trust fund, held in reserve by the stockholders for the benefit of creditors; and suits to establish and enforce the trust are maintainable against the representatives of deceased stockholders upon the theory that the decedent held money equal to the amount of his unpaid subscription in trust for the creditors, and that the fund, although incapable of identification, has passed into the hands of the executor or administrator. Such a fund is no part of the estate of the deceased person. No necessity, therefore, exists for the presentation of any demand against the personal representative before bringing suit. *Thompson* v. *Reno Savings Bank et al.* *Nev.*, 634.

2. STOCKHOLDER'S LIABILITY FOR UNPAID SUBSCRIPTIONS—STATUTE OF LIMITATIONS.—The defendant, in the state of New York, in 1865, subscribed to certain shares of stock of the National Express and Transportation Company, a corporation organized under the laws of Virginia. The laws of that state required that upon every subscription for shares in any joint-stock company there should be paid upon each share two dollars at the time of subscribing, and the residue thereof as required by the president and directors. On December 14, 1880, in a suit instituted in the chancery court of the city of Richmond, Va., it was decreed that thirty per cent of the par value of each share of stock should be called for, and required to be paid by the subscribers, for the purpose of paying the debts of the corporation: *Held*, that under the defendant's contract of subscription his liability for the unpaid portion thereof did not become fixed until a call by the president and directors; that the call made by the chancery court was the same, in effect, as if it had been made by such officers; and that the statute of limitations commenced to run against defendant's liability for such call from the date of the decree, and that under section 339 of the code of civil procedure such liability was barred in two years. *Glenn, Trustee*, v. *Saxton. Cal.*, 755.

3. MORTGAGE TO—ULTRA VIRES—MORTGAGOR CANNOT QUESTION CORPORATE EXISTENCE.—In an action by a corporation to foreclose a mortgage, given to secure a loan to the defendant, the latter cannot question the legality of plaintiff's corporate existence, or its power to enter into the contract. *Grangers Business Association of California* v. *Clarke. Cal.*, 82.

4. FOREIGN CORPORATIONS ARE NOT PROHIBITED FROM DOING BUSINESS in Montana. *Garfield M. & M. Co.* v. *Hammer. Mont.*, 2.

5. EVIDENCE OF EXISTENCE DE FACTO.—In such action the corporate existence of the plaintiff may be established by evidence that it was a corporation *de facto*. *Oakland Gas Light Company* v. *Dameron. Cal.*, 154.

6. CREDITOR'S SUIT—REMEDY BY ASSESSMENT.—A judgment creditor of a corporation, who has exhausted his remedy at law, may maintain a suit in equity to subject the unpaid subscriptions of the stockholders to the satisfaction of his claim. He is not confined to a remedy by assessment, to be levied by the trustees upon all the stockholders. *Thompson* v. *Reno Savings Bank. Nev.*, 634.

7. THE DECREE ENTERED IN THIS ACTION reviewed, and held unobjectionable. *Id.*

See MUNICIPAL CORPORATIONS; TAXATION, 3.

COSTS.

1. COSTS—JUDGMENT FOR PLAINTIFF—UNPREJUDICIAL ERROR.—One who, on application of the defendant, is joined as a party plaintiff, and as such answers a cross-complaint in an action of ejectment, is entitled to a judgment for costs upon findings being made in his favor. And it is error for the court to add such costs to the amount of the cost-bill of the original plaintiff, and to enter judgment for the full amount against the defendant. Such error will not warrant a reversal of the judgment, as it is without prejudice to the defendant. *George* v. *Silva. Cal.*, 670.

See ATTACHMENT, 4.

COUNTER-CLAIM.

1. COUNTER-CLAIM IN FAVOR OF ONE DEFENDANT—ACTION ON JOINT LIABILITY.—One of two or more defendants sued on a joint and not a joint and several liability, cannot set up as a counter-claim a cause of action in his favor alone against the plaintiff. *Roberts et al.* v. *Donovan et al. Cal.*, 672.

COUNTY GOVERNMENT ACT.

See FEES, 1.

COVENANTS.

1. COVENANT OF QUIET ENJOYMENT—BREACH OF, HOW ALLEGED.—A covenant for quiet enjoyment is never broken until there has been some hostile assertion of a better title. Consequently, in an action to recover for such breach, an allegation that the grantor, at the time of making the deed, was not and never has been, the owner of the land granted, is sufficient to show a breach of the covenant. *Moryan* v. *Henderson. Wash.*, 120.

CREDITOR'S SUIT.

See CORPORATIONS, 6.

CRIMINAL LAW—IN GENERAL.

1. ARRAIGNMENT—FAILURE TO READ INDICTMENT TO PRISONER.—The provision of the statute requiring the defendant, in a criminal prosecution, to be furnished with a copy of the indictment, is a better means of informing him of the nature of the charge, than reading the indictment to him. Consequently where such copy is furnished the failure to read it to him on his arraignment is not a fatal defect. And this, although such copy was furnished but a few moments before he was called upon to plead, if he made no objection and made no protest to a statement of his counsel that "we have read the indictment and know its contents." *Minich* v. *People. Col.*, 580.

2. FAILURE TO FURNISH DEFENDANT WITH LIST OF WITNESSES.—The failure to furnish a defendant charged with murder with a list of all the witnesses called by the prosecution, prior to the arraignment, is not a fatal error, if prior to the trial he is furnished with the names of all witnesses called in chief, and there is no showing that he was in any way surprised, or his rights prejudiced by reason of the fact that he was not sooner apprised that they would be sworn. *Id.*

3. FAILURE TO FURNISH DEFENDANT WITH LIST OF PETIT JURORS.—The failure to furnish a defendant with a list of the petit jurors prior to his arraignment, unless it appears that he was prejudiced thereby, will not warrant setting aside a conviction when such list was furnished him prior to his trial, and no objection was made upon this ground, either to the arraignment or to impaneling the jury and going to trial. *Id.*

4. RECORD OF ARRAIGNMENT.—A record which recites that the defendant "personally appeared in open court and was duly arraigned on said indictment," sufficiently shows an arraignment. *State* v. *Abrams. Or.*, 509.

5. TRIAL—SETTING DAY FOR—DEFENDANT NEED NOT BE PRESENT.—The appointment of a day for the trial of a criminal prosecution is no part of the trial, and may be made in the absence of the defendant. *Id.*

6. APPEALS IN CRIMINAL CASES—TRANSCRIPTS—IMPANELING OF GRAND JURY.—Under sections 212 and 241 of the criminal code, transcripts on appeal in criminal cases need not contain a record that a grand jury was impaneled, or that a foreman was appointed at the term of court at which the indictment purports to have been found. *Id.*

7. MISCONDUCT OF COUNSEL—NEW TRIAL.—No objections to proceedings in the lower court can be heard on appeal which are not based on alleged error in judicial action. If abuses of counsel have occurred during the trial, without the fault of the court or of the party complaining, the injured party has his remedy by motion for a new trial. But he cannot claim a reversal of the judgment on account of such irregularities, which have never been submitted to the trial court for its determination. *Id.*

8. DEFENDANT WITNESS IN HIS OWN BEHALF—CROSS-EXAMINATION AND IMPEACHMENT OF.—Where a defendant in a criminal case avails himself of the privilege of becoming a witness in his own behalf, he subjects himself to the same rules of cross-examination as any other witness. And if, on such examination, he denies having made certain statements, in conflict with his declarations on the trial, the prosecution may give evidence to the contrary, for the purpose of impeaching his testimony. The evidence of the impeaching witnesses is admissible if the declarations testified to by them are the same in substance with the words used in the impeaching questions. *Id.*

9. REASONABLE DOUBT DEFINED.—The reasonable doubt which will warrant a jury in returning a verdict of acquittal means a serious, substantial, and well-founded doubt, and not a mere possibility of a doubt. It is such a doubt as in the important transactions of life would cause a reasonable and prudent man to hesitate and pause. *Minich* v. *People. Col.*, 580.

10. CONVICTION—REASONABLE DOUBT—MORAL CERTAINTY.—A conviction from the facts in evidence of the defendant's guilt to a reasonable and moral certainty is a conviction beyond a reasonable doubt. *State* v. *Abrams. Or.*, 510.

11. DELIBERATE USE OF WEAPON DEFINED.—A definition that a deliberate use of a deadly weapon is "an intentional use; a use that is the result of a resolution, purpose, or design, formed in the mind and reflected upon, and not done in self-defense;

it is only necessary that it be the act of the mind when the mind has had time to act without heat or passion"—is sufficiently certain and correct. *Id.*

12. CONVICTION DEFINED—BAIL AFTER VERDICT NOT ALLOWABLE.—The ordinary meaning of the word "conviction" is a finding by the jury of a verdict that the accused is guilty. The word is used in that sense in sections 1271 et seq. of the penal code. Consequently, under such sections, a defendant, convicted of a felony, in a case not punishable with death or by fine only, is not entitled as of right to be admitted to bail after a verdict of conviction. If bail is allowable at all in such cases, it must be as a matter of discretion. *Ex parte Brown et al. on Habeas Corpus. Cal.*, 394.
13. GRAND JURY—PRESENCE OF STRANGER BEFORE—OBJECTION UNAVAILING AFTER TRIAL.—The fact that a person other than the district attorney was present before the grand jury for the purpose of assisting them in the examination of witnesses and in framing the indictment, while highly improper, cannot be taken advantage of after trial and verdict upon a motion for a new trial. *State* v. *Justus. Or.*, 515.
14. ACT CONSTITUTING TWO OFFENSES—PRIOR CONVICTION.—Where the same act constitutes two distinct offenses, one against the state and the other against the municipality wherein it was committed, a conviction for the offense against the latter is no bar to an action by the state. *Hughes* v. *People. Col.*, 610.
15. THE SAME—DEMURRER TO PLEA OF PRIOR CONVICTION.—A plea of former conviction, notwithstanding an averment that the offense of which the defendant had been convicted and that of which he stood charged were one and the same, may be demurred to, and the demurrer sustained, if the plea further sets forth facts from which it appeared that the two offenses were separate and distinct. *Id.*
16. THE SAME—JUDGMENT MAY BE ENTERED UPON SUSTAINING DEMURRER.—Upon sustaining a demurrer to a plea of former conviction, the court has power to enter judgment against the defendant the same as after trial and verdict of guilty. *Id.*
17. NO COMMON-LAW OFFENSES IN OREGON—OFFENSE WITHOUT PENALTY.—In Oregon there are no indictable common-law offenses. Consequently the violation of a statute, creating an offense, but not imposing a penalty, while indictable as a misdemeanor at common law, as for a contempt against the statute, is not indictable as such under the Oregon statute. *State* v. *Gaunt. Or.*, 656.
18. CRIMINAL TRIAL—BIAS AND PREJUDICE OF JUDGE.—A judge is not disqualified to try a criminal case by reason of mere bias or prejudice against the accused. *McDowell* v. *Levy, Judge, etc. Cal.*, 429.
19. ABSENCE OF THE DEFENDANT FROM THE COURT, when the jury returned a verdict of conviction, vitiates the verdict. *Smith* v. *People. Col.*, 577.
20. PRISONER CANNOT BE KEPT IN IRONS DURING TRIAL.—A prisoner cannot be kept in irons during his trial for a criminal offense. The delay and difficulty of removing such irons will not justify the refusal to have them removed. *State* v. *Smith. Or.*, 520.

See ACCESSARIES, 1; ARREST; ASSAULT; BURGLARY; EVIDENCE, 14–19; FORGERY; JURY AND JURORS; MURDER AND MANSLAUGHTER; RIOT.

CROSS-COMPLAINT.

See TRESPASS.

CRUELTY.

See DIVORCE, 1, 2, 5.

DAMAGES.

1. VERDICT—EXCESSIVE DAMAGES.—A verdict of one thousand three hundred dollars recovered in an action for damages caused by a beating, will not be set aside as excessive. *May et al.* v. *Steele. Cal.*, 539.

See CONVERSION; EMINENT DOMAIN, 6, 8–11; FORGERY, 1; SALE, 2; SLANDER, 2.

DEBTOR AND CREDITOR.

1. DEBTOR AND CREDITOR—PAYMENTS FOR BENEFIT OF CREDITOR.—One person cannot, without authority, pay the debt of another and charge the amount so paid against the party for whose benefit the payment was made. *McGee* v. *City of San Jose. Cal.*, 210.

2. CONTRACT WITH MUNICIPALITY—TERMS OF CANNOT BE CHANGED BY LEGISLATION.—A contract entered into with a municipality, which provides for a certain mode of payment by the city cannot be changed by subsequent legislation, so as to authorize a performance different from that prescribed in the contract. And payments made in conformity with such subsequent legislation will not bind the contractor unless assented to by him. *Id.*

See ASSIGNMENT, 2; ASSIGNMENT FOR BENEFIT OF CREDITORS; DURESS; FRAUDULENT CONVEYANCES; SUPPLEMENTAL PROCEEDINGS.

DECISION.

See FINDINGS, 1.

DECREES.

See JUDGMENT.

DEDICATION.

1. DEDICATION OF STREET—FILING MAP—RESERVATION.—The filing and recording of a map on which certain lands are designated as streets cannot have the effect to dedicate other lands as streets which are expressly reserved from the dedication. *Heidle* v. *East Portland.* *Or.*, 639.

DEEDS.

1. ADMISSIBILITY OF—WHETHER INCLUDES PREMISES IN DISPUTE.—When a deed is offered in evidence to show title to the *locus in quo*, an offer by the adverse party to prove facts showing that such deed was not intended to include the premises in dispute, does not go to the admissibility of such deed, but only to its effect. *Dent* v. *Bird et al.* *Cal.*, 142.

2. CANNOT BE VARIED BY PAROL EVIDENCE—CONSTRUCTION.—Parol evidence is never permitted to vary or contradict the terms of a written instrument. While evidence is admissible of all the circumstances surrounding the maker of the instrument, parol evidence of other language, declaring his meaning, than that which is contained in the instrument itself, is not admissible. If, therefore, the language of a deed in question is unambiguous, and admits of but one construction, no parol evidence could be material to its construction, and the rejection of evidence offered for such purpose would not be error. *Id.*

3. EVIDENCE OF GRANTOR'S INTENTION NOT ADMISSIBLE.—Where a deed is silent as to the quantity of land intended to be conveyed, and the description is broad enough to include both high lands and adjoining marsh lands, parol evidence that it was the intention of the grantor to exclude such marsh lands, and to limit the conveyance to a specified number of acres, is inadmissible. *Id.*

4. UNCERTAINTY OF DESCRIPTION—EVIDENCE TO IDENTIFY LAND.—A deed, which describes the property conveyed as "all the right, title, interest, and demand which the grantor has, or ought to have, in and to all those lots and parcels of land lying in the town of Silverton, which remained undivided amongst the proprietors of said town site upon delivery of deeds by the trustee, of said town site, to the said proprietors, the same being one-twelfth undivided interest in said undivided lots," is not void for uncertainty of description. And parol evidence is admissible for the purpose of identifying the property intended to be conveyed. *Blair et al.* v. *Bruns.* *Col.*, 285.

5. ADMISSION IN ANSWER DISPENSES WITH PROOF.—Where the answer admits the identity of certain land with that described in a particular conveyance, evidence to prove such fact is unnecessary; and the admission of incompetent evidence for such purpose is not error. *Id.*

6. PAROL RESERVATION NOT BINDING—SUBSEQUENT GRANTEE WITHOUT NOTICE.—A deed of real estate, "with all the improvements thereon," cannot be varied by parol evidence that at the time of the conveyance it was understood and agreed between the parties that certain fixtures should be reserved to the grantor. Whatever liability is incurred by the grantee, by reason of such verbal agreement, none is incurred by a subsequent purchaser from him, without notice. *Snyder* v. *Board of County Commissioners of Boulder County et al.* *Col.*, 533.

7. CONFLICTING BOUNDARIES—KNOWN MONUMENTS MUST CONTROL.—The plaintiffs and defendant owned adjoining tracts of land, each claiming under deeds from the same grantor. The lines along the northerly line of plaintiffs' land, and the southerly line of defendant's, which should be identical, varied, as to their course, one fourth of a degree, which, according to the testimony, would make a difference of thirteen and one half feet in the location of the north-west corner of plaintiffs' and the south-west corner of defendant's land, which corners should be the same: *Held*, that the known and fixed monuments must prevail over the courses and distances; and, upon a review of the evidence, that the premises in dispute was included within the land granted to the defendant. *Beaudry et al.* v. *Doyle.* *Cal.*, 299.

See ADVERSE POSSESSION, 1, 2; APPEAL, 21; CONTRACT, 3; MARRIED WOMAN; MORTGAGE, 1, 2.

DEFAULT.

1. OPENING DEFAULT JUDGMENT—DISCRETION OF COURT.—It is within the legal discretion of the trial court to grant motions to open defaults, or the contrary, and in the absence of an abuse of such discretion its action will not be reversed. *Dougherty* v. *Nevada Bank of San Francisco.* *Cal.*, 563.

2. THE SAME—EXCUSABLE ABSENCE OF ATTORNEY—SURPRISE.—Where judgment by default is taken against the defendant, in his absence and that of his counsel, an order setting aside such judgment will not be reversed, if it appears that the absence of counsel was due to his excusable neglect, and that he was taken by surprise. *Id.*

3. EQUITABLE ACTION—DEFAULT—RELIEF GRANTED UNDER GENERAL PRAYER.—In an equitable action, where judgment by default is rendered, if the specific relief asked cannot be granted, such relief as the case stated in the complaint authorizes may be had, under a prayer for general relief. *Oliver, Administrator, et al.* v. *Blair et al.* *Cal.*, 214.

4. THE OPINION IN DEPARTMENT, REPORTED in 6 West Coast Rep. 374, approved. *Id.*

DELIVERY.

1. CONDITIONAL DELIVERY OF WRITTEN CONTRACT—PAROL EVIDENCE.—Parol evidence is admissible to show that the delivery of a written contract, not under seal, was made on conditions. *Simpson* v. *Carson.* *Or.*, 637.

DEMAND.

1. ACTION FOR POSSESSION OF PERSONALTY—DEMAND, WHEN NECESSARY.—In an action to recover personal property, or its value, where it appears that the property came lawfully into the possession of the defendant, a demand and refusal to deliver must be shown. If the original possession is acquired by tort, no demand previous to the institution of the action is necessary. *McNally et al.* v. *Connolly.* *Cal.*, 679.

2. THE SAME—DEMAND, WHEN NECESSARY BY JUDGMENT PURCHASER.—Judgment debtors whose real property has been sold under execution may lawfully retain possession thereof, after the time for redemption has expired, until the execution purchaser has demanded to be let into possession. And until such demand the execution purchaser cannot maintain an action to recover possession of fixtures removed by the judgment debtors. *Id.*

DEMURRER.

1. OFFICE OF GENERAL AND SPECIAL.—A complaint which fails to state all the facts essential to a recovery may be attacked by a general demurrer, under subdivision 6, of section 430 of the code of civil procedure. But where a complaint states all the facts essential to a recovery, but states them imperfectly, a demurrer, to be effectual, must be special and directed against the very defect apparent. *Tehama County* v. *Bryan.* *Cal.*, 222.

2. PLEADING—GENERAL DEMURRER—AMBIGUITY.—The division of a complaint into a number of counts does not, of itself, constitute an ambiguity or uncertainty which can be taken advantage of by general demurrer. The particular matter constituting an ambiguity in a pleading must be pointed out by a special demurrer. If that be not done a general demurrer on that ground may be disregarded. *Demartin* v. *Albert.* *Cal.*, 568.

3. SEVERAL DEFENSES—FAILURE TO STATE SEPARATELY—OBJECTION HOW TAKEN.—Under section 444 of the code of civil procedure, an answer containing several defenses, not separately stated, cannot be demurred to; such defect can only be reached by motion to strike out, or by some other appropriate proceeding. *Hagely* v. *Hagely*. *Cal.*, 752.

4. DEMURRER TO ANSWER—AMENDED ANSWER—WAIVER OF OBJECTION.—Where separate defenses are set up in an answer, and a demurrer is sustained to one or more of such defenses, and the defendant subsequently files an amended answer, it will amount to a waiver of error as to such defenses as are pleaded anew in such amended answer, but not as to defenses to which the demurrer was sustained, and which are not again pleaded in the amended pleading. *Id.*

5. ANSWERING DOES NOT WAIVE DEMURRER FILED.—If a complaint improperly joins two causes of action, advantage of the defect must be taken by demurrer, or it is waived. If such demurrer be improperly overruled, the defendant does not waive the defect by answering. *Reynolds* v. *Lincoln*. *Cal.*, 666.

6. ALL OBJECTION TO THE MISJOINDER OF CAUSES OF ACTION, unless taken advantage of by demurrer, is waived. *Wenner* v. *Smith*. *Utah*, 746.

7. DECISION ON DEMURRER TO ANSWER—CASE AT LAW—WRIT OF ERROR.—A decision, overruling a demurrer to an answer, which set up merely legal defenses, is a decision at law. Such decision must be brought to the supreme court for review on writ of error. If no errors are assigned, the proceeding will be dismissed. *Brown et al.* v. *Rank*. *Wash.*, 189.

See CRIMINAL LAW, 18; FINDINGS, 4.

DENVER.

1. SUPERIOR COURTS—ACT ESTABLISHING IS VALID—SPECIAL LEGISLATION.—Chapter 103 of the general statutes, establishing a superior court in cities having a population of twenty-five thousand, although at present only applicable to the city of Denver, is not obnoxious to section 25, article 5, of the constitution, prohibiting special legislation. Such court is neither a district court, nor a court of the same class or grade, and consequently is not violative of section 14 and article 6 of the constitution. Its creation is authorized by section 1 of said article. *Darrow* v. *People ex rel Norris*. *Col.*, 267.

2. QUALIFICATION FOR OFFICE—LEGISLATURE MAY IMPOSE PROPERTY RESTRICTION.—The legislature may make the payment of taxes a necessary qualification for membership in the board of aldermen of a city. Section 6, article 7, of the constitution, providing that "no person except a qualified elector shall be elected or appointed to any civil or military office in the state, does not impliedly inhibit the addition of such property qualification. *Id.*

3. CITY CHARTER OF DENVER—AMENDMENTS OF—SPECIAL LEGISLATION.—The law specifically relating to the city of Denver is not obnoxious to constitutional inhibitions against local or special legislation; and inasmuch as prior to and at the time of the adoption of the state constitution the entire city government was regulated by special charter, and as its citizens have not elected to abandon such charter and incorporate under the general laws, the charter remains in force; and a legislative revision or amendment thereof will not be reviewed for the purpose of determining whether or not the changes incorporated could be made by special legislation. *Darrow* v. *People ex rel. Norris*. *Col.*, 575.

4. THE SAME—CITY COUNCIL HAS POWER TO JUDGE OF QUALIFICATION AND ELECTION OF MEMBERS.—The provision of the charter of the city of Denver, as amended by the acts of 1881, 1883, and 1885, that "the city council shall be the sole judge of the qualifications, elections, and returns of its members," etc., is not obnoxious to section 12, article 7, of the constitution, requiring the general assembly, by general laws, to designate the courts and judges by whom election contests shall be tried. *Id.*

DESCRIPTION.

See DEEDS, 4, 5; MECHANIC'S LIEN, 4; REPLEVIN, 1, 2.

DISCHARGE.

See BANKRUPTCY.

DISCRETION.

See DEFAULT, 1.

DISMISSAL.

1. PLAINTIFF CANNOT DISMISS ACTION AFTER TRIAL AND SUBMISSION.—After a cause has been regularly tried and submitted for decision it cannot be dismissed on plaintiff's motion. *Casey et al.* v. *Jordan et al. Cal.*, 484.

DIVORCE.

1. WHEN GRANTED—CRUELTY.—A divorce will not be granted on the ground of cruelty, unless the proof be clear and satisfactory of the truth of the charge preferred. *Taylor* v. *Taylor. Or.*, 410.
2. PROVOCATION BY WIFE.—The cruel treatment which lays the foundation for a divorce, must be unmerited and unprovoked. And when the wife is ill-treated on account of her own misconduct, her remedy is a reform of her own manners, unless the return from the husband is wholly unjustified by the provocation, and quite out of proportion to the offense. *Id.*
3. FORM OF DECREE—DIVISION OF PROPERTY—CUSTODY OF MINOR CHILDREN.—The provision of section 495 of the civil code, that "whenever a marriage shall be declared void and dissolved, the party at whose prayer such decree shall be made shall in all cases be entitled to the undivided one-third part . . . . of the whole of the real estate owned by the other party at the time of the decree," etc., is imperative; while the provision of section 497, empowering the court to further decree, for the care and custody of minor children, and for the recovery from the party in fault of such an amount of money as may be just for the maintenance of the other, is permissive only. *Boon* v. *Boon. Or.*, 115.
4. THE SAME.—A decree of divorce should provide for the care and custody of the minor children, if there are any. *Id.*
5. CRUEL TREATMENT—EVIDENCE.—The evidence in support of the allegations of cruel and inhuman treatment by the defendant reviewed at length, and held not to warrant a decree of divorce. *Id.*

DUE BILL.

See CONSIDERATION, 3.

DURESS.

1. RELINQUISHMENT OF DEBT.—The relinquishment of a debt, effected by the use of coercive means against the creditor by the debtor, amounting to duress, is not valid, whether the party relinquishing is of sound mind or not. *Parmentier* v. *Puter. Or.*, 660.
2. RESTRAINT OR FEAR INCITED BY THREATS.—The relinquishment of a debt under a restraint or fear incited by threats that an impending calamity would befall the creditor unless he complied with the demands of the debtor is invalid, although the threats were vague, and the danger remote, if they were sufficient to accomplish their purpose. *Id.*

EASEMENT.

1. EASEMENT TO OVERFLOW—OWNERSHIP TO SOIL.—An owner of land has no right, as such, to turn back a river upon the land of a proprietor above him. *Wattier* v. *Miller. Or.*, 411.
2. PRESCRIPTION—UNITED STATES LAND.—A right to overflow the lands of the United States, or of the state, cannot be acquired by prescription. *Id.*
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4. CERTIFICATE OF SALE—RIGHT OF POSSESSION.—A certificate of sale to swamp-land conveys a present interest, with a right to the possession, liable to be defeated upon the failure to perform subsequent conditions. *Id.*

EJECTMENT.

1. AVERMENTS OF COMPLAINT.—A complaint in ejectment is good if it aver the seizure of the plaintiff; the possession of the defendant at the time of the commencement of the action, and the withholding of the possession. *N. P. R. R. Co.* v. *Lilly. Mont.*, 727.

2. ANSWER SETTING UP EQUITABLE DEFENSE—WAIVER OF TRIAL OF.—Where a defendant, whose answer in an action of ejectment sets up an equitable defense, does not ask that such defense should be first tried, but assents to a trial of the whole cause, he cannot object, after trial, because the equitable defense was not first tried, before entering upon a trial of the issues of law. *George* v. *Silva*. *Cal.*, 670.
3. POSSESSION OF TENANT IS POSSESSION OF LANDLORD.—In an action of ejectment, evidence that the defendant was the landlord of the tenants in possession, is sufficient evidence of the possession of the defendant, under section 379 of the code of civil procedure. *Oakland Gaslight Co.* v. *Dameron*. *Cal.*, 154.
4. EQUITABLE ISSUES MUST BE FIRST TRIED.—In an action of ejectment equitable issues raised by the answer should be first tried. *Schiefferly* v. *Tapia*. *Cal.*, 419.

ELECTION.

1. ELECTION OF INELIGIBLE CANDIDATE—DE FACTO OFFICER—ACTS OF, VALID.—The election to an office, of one who is legally incapable of performing the duties thereof, is not an absolute nullity. If such person receives a majority of the legal votes cast, is declared by the proper canvassing board duly elected, is inducted into the office and proceeds with the performance of its duties, he is a *de facto* officer, until his disability is adjudged by a proper tribunal; and his acts performed in the discharge of his official duties are valid and binding. Upon ouster of such person, the candidate who received a minority of the legal votes polled, is not entitled to the office. In such case a vacancy is created. *Darrow* v. *People*. *Col.*, 267.
2. CONGRESSMEN WERE NOT VOTED FOR UNDER THE ACT OF 1872, AT THE ELECTION OF NOVEMBER 4, 1884.—Conceding that the act of March 13, 1883, entitled "an act to divide the state of California into congressional districts," was invalid, because of non-compliance by the legislature with certain formalities required by the constitution, still, the petitioners are not entitled to a mandate directing the secretary of state to certify to the governor that two of them were duly elected congressmen-at-large, and that each of the others was elected a member of the house of representatives, in a congressional district created by the act of March 30, 1872, because the electors throughout the state did not vote for two members of congress-at-large, nor did the electors within the limits of each of the congressional districts, as prescribed by the act of 1872, vote for a member of congress to represent the people of such district. *People ex rel. Leverson* v. *Thompson, Secretary, etc.* *Cal.*, 29.
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See CONSTITUTIONAL LAW, 10; PROTESTANT EPISCOPAL CHURCH, 1.

EMINENT DOMAIN.

1. PETITIONER, WHEN MAY ABANDON—EFFECT OF POSSESSION PENDENTE LITE.—A petitioner, in eminent domain proceedings, loses the right of abandoning the same, whenever the land-owner acquires a vested right to the compensation awarded. Under section 242 of the code of civil procedure this privilege of abandonment may be exercised at any time prior to the payment or deposit, in the manner provided, of the sum awarded. The petitioner, however, is liable for all legitimate expenses and injuries to the land-owner occasioned by the proceedings. The right to abandon

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is not lost by reason of the petitioner's taking possession of the land, *pendente lite*, in the manner authorized by such section. Taking possession, under the statute, creates no contract between the petitioner and the land-owner; consequently, an abandonment cannot impair the obligation of a contract. *D. & N. O. R. R. Co.* v. *Lamborn et al. Col.*, 261.

2. ABANDONMENT PENDING APPEAL.—Under such statute, the party dissatisfied with the final determination of the court below, may appeal to the supreme court. By so doing, the petitioner does not waive or destroy his right to abandon; until such court has acted and confirmed the conclusions reached below, the amount of compensation for damages is not *finally* determined; and until then, the petitioner may abandon, although he has been in possession *pendente lite*. *Id.*
3. PARTIAL ABANDONMENT—CONDEMNATION FOR RIGHT OF WAY.—Where the petition sought the condemnation for a railroad depot, grounds, machine-shop and right of way, the petitioner may, upon return of the award, if already in possession, retain and use the right of way, pending proceedings for its condemnation, and abandon as to the rest. *Id.*
4. ERRORS ASSIGNED CONSIDERED, and held that the award, and the order refusing to vacate it, should not be disturbed. *Id.*
5. ROAD—ALLEGATION THAT PETITIONERS ARE TAX-PAYERS.—In an action to condemn land for the use of a public highway, the complaint reviewed and held to sufficiently allege that the persons petitioning for the road were taxable in the road district for road purposes. *Tehama Co.* v. *Bryan. Cal.*, 222.
6. ALLEGATION OF MONEY IN TREASURY TO PAY DAMAGES.—In such action the complaint averred an order of the board of supervisors setting apart the damages, awarding to defendant, and that the county treasurer set apart the sum so awarded, which sum still remains in the county treasury: *Held*, that this was a sufficient allegation, that at the time the board of supervisors awarded damages to the defendant, there was money in the road district fund with which to pay the same. *Id.*
7. THE REPORT OF THE VIEWERS REVIEWED and held sufficient to invest the supervisors with jurisdiction to proceed in the matter of opening the road. *Id.*
8. DAMAGES, HOW ASCERTAINED—FINDINGS ON.—In proceedings to condemn land for a public use, section 1,248 of the code of civil procedure, requires the value of the land or property to be taken and all improvements thereon pertaining to the realty to be valued; but does not require the improvements to be assessed separately from the land; consequently, a finding of the total damages, without a finding on the value of the land, is sufficient. *Id.*
9. IN SUCH ACTION A FAILURE TO FIND AS TO THE BENEFIT which would accrue to the portion of the defendant's land not taken, is not prejudicial error. *Id.*
10. VALUE OF LAND DETERMINED AS OF TIME OF SUMMONS.—Section 1,249 of the political code, fixing the date of the summons as the time at which to ascertain the value of the land sought to be taken, is constitutional. *Id.*
11. IMMEDIATE PAYMENT OF DAMAGES.—On the day when the board of supervisors ordered the sum of money awarded by them to the defendant as damages, to be set apart in the treasury, out of the road fund of the road district, the treasurer had not at the time set apart to that road district the money to which it was entitled for the year. Such money was then in the general fund of the county. The board, thereupon, ordered a warrant drawn upon the general fund, by the auditor, in favor of the county treasurer, for the amount set apart to the defendant, and on the following day the treasurer set apart the money for the defendant: *Held*, that the statute requiring immediate payment to the party in whose favor damages are awarded, etc., was sufficiently complied with. *Id.*
12. ROAD LAWS—REPEAL OF, DID NOT ABROGATE EXISTING ROAD DISTRICTS.—The act of February 28, 1883, repealing chapter 2 of title 6 of part 3 of the political code, and all laws concerning roads and highways in conflict therewith, did not have the effect of abrogating all existing road districts, organized before the passage of such act. *Id.*
13. SUPPLYING WATER TO MUNICIPAL CORPORATION A PUBLIC USE—LAND MAY BE CONDEMNED FOR RESERVOIR.—The supplying of the inhabitants of an incorporated city with pure fresh water, is, under section 1,238 of the code of civil procedure, declared to be a public use, in behalf of which the right of eminent domain may be exercised, and, under section 1,239 of such code, the entire estate, in a given piece of land, may be taken when needed for a reservoir in behalf of such use. *Lake Pleasanton Water Company* v. *Contra Costa Water Company. Cal.*, 145.
14. QUESTION AS TO CONFLICTING PUBLIC USES—DEMURRER.—In an action of eminent domain, where the complaint does not show that the land is appropriated to any

public use, the question whether the public use, for which the condemnation is sought, is more necessary that the public use to which it has been already appropriated, cannot arise on demurrer to the complaint. *Id.*

15. APPEAL — NOTICE OF APPEAL MUST BE SERVED.—Defendants, in an action prosecuted in the name of the people for the condemnation of lands belonging to them in severalty, are adverse parties each to the other, and upon an appeal by one from the judgment against him, notice of appeal must be served on the others. *Butte County* v. *Boydstun et al.* *Cal.*, 422.

EMPLOYER AND EMPLOYEE.

See NEGLIGENCE, 1, 2, 9.

ENTRY.

See ADVERSE POSSESSION, 6.

ESTATES OF DECEASED PERSONS.

1. ACCOUNTING BY ADMINISTRATOR—COURT MAY ORDER SEVERAL ACCOUNTS TO BE COMBINED.—If an account, presented by an administrator, is not sufficiently specific, the superior court, sitting as a court of probate, has power to require the administrator to make it more specific. And if, pending the settlement of such account, the administrator presents a second account, the court may order him to present one account of his administration which shall be full and complete up to the time of its rendition. *Hirshfeldt* v. *Cross, Judge, etc.* *Cal.*, 147.

2. EXECUTOR CANNOT BE COMPELLED TO PAY MONEY TO COUNTY TREASURER.—Upon the settlement of the final account of an executor, the court has no power to order him to pay the money in his hands to the county treasurer. *Estate of McMahon, Deceased.* *Nev.*, 409.

3. PRESENTATION OF CLAIMS NOT DUE.—Under the provisions of the code of civil procedure, regulating the settlement of the estates of deceased persons, as the same existed in 1872, all claims against a decedent's estate, whether due or not due, should be presented to the administrator within legal time after publication of notice to creditors; and if they were not so presented the law declared them "forever barred." *Estate of Swain, Deceased.* *Cal.*, 112.

4. CLAIM DEFINED—STATED ACCOUNT—INTEREST.—The term "claim," as used in connection with the estates of deceased persons, has reference to such debts or demands against the decedent as might have been enforced against him in his life-time by personal actions for the recovery of money, and upon which a money judgment could have been rendered. A statement of a balance struck upon an account between the claimant and the decedent, is a sufficient statement of the claim, if properly verified, for the presentation of it to the administrator. If such claim be allowed and approved as presented, the presumption is that it was allowed upon "vouchers and proofs," to the satisfaction of the administrator and the probate judge. Thus, if interest on the account be allowed at more than the legal rate, in the absence of evidence to the contrary, a written contract for the payment of such rate of interest will be presumed. *Id.*

5. VOID SALES BY PROBATE COURTS—ACTION BY HEIR FOR PROPERTY SOLD MUST BE BROUGHT WITHIN THREE YEARS AFTER SALE.—The provision of the probate act that "no action for the recovery of any estate, sold by an executor or administrator under the provisions of this chapter, shall be maintained by any heir or other person claiming under the deceased testator or intestate, unless it be commenced within three years next after the sale," applies to all sales, void as well as voidable, made by probate courts, of real estate belonging to persons who have died since the passage of the probate act; and this, although the invalidity of the sale results from an insufficiency in the notice for the appointment of the administrator. *Ganahl et al.* v. *Soher et al.* *Cal.*, 235.

See EXECUTORS AND ADMINISTRATORS; MORTGAGE, 9.

ESTOPPEL.

See FINDINGS, 8; MARRIED WOMEN, 1; NOTICE, 3; PATENTS, 5.

EVIDENCE.

1. MODEL, MAP, OR DIAGRAM USED FOR ILLUSTRATION NO PART OF.—A model, map, or diagram of the *locus in quo*, used on the trial simply for the purpose of illustrating the testimony of the witnesses, and which are not introduced in evidence, are not part of the evidence which should be embodied in a statement on appeal. *Albion Con. M. Co.* v. *Richmond M. Co. Nev.*, 100.

2. VOID JUDICIAL PROCEEDINGS, WHEN ADMISSIBLE IN EVIDENCE.—A void probate proceeding, to cure which a deed has been executed between the parties, is admissible in evidence, as a private writing and as part of the *res gestæ*, in a subsequent action founded on such deed, to explain and show the circumstances and consideration under and for which the deed was executed. *Stinson* v. *Porter, Executor, etc. Or.*, 120.

3. PRIVILEGED COMMUNICATIONS—STATEMENTS MADE TO MEMBER OF BAR.—Statements made by parties to the action to a member of the bar, who is not their attorney or legal adviser, are not privileged communications. *George* v. *Silva. Cal.*, 670.

4. CERTIFIED COPIES OF RECORDED DOCUMENTS ADMISSIBLE IN EVIDENCE.—Under the statutes of Montana, certified copies of the certificate of incorporation of a corporation, of the declaratory statement under oath of the locators of a mining claim, and of deeds, are admissible in evidence without first accounting for the original. *Garfield M. & M. Co.* v. *Hammer. Mont.*, 2.

5. EXPERT TESTIMONY—OPINION AS TO WORK ON MINE.—A witness not shown to be a mining expert cannot testify whether, in his opinion, any work had been done on the shaft of a mine within a given period. *Id.*

6. EXPERT TESTIMONY AS TO NATURE OF WOUND.—A witness, although not a professional expert, may testify as to whether, in his opinion, a wound was inflicted with a dull or sharp instrument, if he testifies that he has had experience with wounds, and is able to tell from seeing them what they were made with. *People* v. *Sullivan. Cal.*, 156.

7. NON-PROFESSIONAL WITNESSES—EVIDENCE AS TO RESULT OF EXPERIMENTS.—The danger of permitting non-professional witnesses to prove, through the instrumentality of experiments, matters not within the range of their observation and experience, and of which they are supposed to be incompetent to deal, commented upon. And in the present case, where the subject under examination was the appearance and characteristics of near gun-shot wounds upon the human body, the result of experiments made by non-professional witnesses upon pasteboard targets held inadmissible. *State* v. *Justus. Or.*, 515.

8. EVIDENCE TO TEST MEMORY AND FAIRNESS OF WITNESS.—To test the fairness and memory of an impeaching witness, everything that was said or done during the conversation testified to is a proper subject of inquiry on cross-examination. *State* v. *Abrams. Or.*, 509.

9. EXPERTS—OPINION AS TO MENTAL CONDITION.—A non-expert witness cannot testify as to his opinion of another's mental condition, without giving the facts upon which it is founded. Nor can an expert testify as to a person's mental condition "under exciting circumstances," unless it be shown that he has seen him under such circumstances. *Id.*

10. INTOXICATION—EVIDENCE OF.—The declarations and acts of a party at a given time are admissible to prove whether or not he was intoxicated. *Id.*

11. PRESUMED TO BE OFFERED FOR ADMISSIBLE PURPOSE.—Where evidence is admisaible for one purpose and not for another, it will be presumed, on appeal, to have been offered for the purpose which will render it admissible. *Id.*

12. SELF-DEFENSE—DANGER TO LIFE OR LIMB NEED NOT BE SHOWN BEYOND REASONABLE DOUBT.—To establish the plea of self-defense, it is not necessary that the fact of damages to life or limb should be shown by the evidence beyond a reasonable doubt; and an instruction to that effect is erroneous. *People* v. *Lee. Cal.*, 239.

13. CHARACTER OF DEFENDANT—EVIDENCE—REASONABLE DOUBT.—In a criminal prosecution the consideration, by the jury, of evidence of the defendant's character is not confined to cases where the guilt of the accused is doubtful. The jury must take such evidence into consideration for the purpose of determining whether it *creates* a reasonable doubt of his guilt. *Id.*

14. CRIMINAL LAW—PREPONDERANCE OF EVIDENCE—REASONABLE DOUBT.—A bare preponderance of proof is not sufficient to convict a person of an infamous crime; and if there be no probable hypothesis of guilt consistent, beyond a reasonable doubt, with the facts of the case, the accused must be acquitted. *Bachman* v. *People. Col.*, 625.

15. THE SAME—NEW TRIAL, WHEN GRANTED.—A court of review may award a new trial in criminal cases whenever, in its judgment, a conviction is not warranted by the proof. *Id.*

16. EVIDENCE REVIEWED AT LENGTH, its character and weight considered, and held not sufficient to support a conviction of grand larceny. *Id.*

17. DEFENDANT WITNESS IN HIS OWN BEHALF—WEIGHT OF TESTIMONY.—Where a defendant is a witness in his own behalf, the court may instruct the jury to consider all the circumstances under which his testimony is given, including his particular personal interest in the result of the trial. *Minich* v. *People.* *Col.*, 580.

18. CROSS-EXAMINATION—IMPEACHMENT OF WITNESS.—Where a witness for the plaintiff denies, on cross-examination, that he offered to procure testimony for the defendant, for a money consideration, the defendant is entitled to give evidence to the contrary. Such case is an exception to the rule that if a question is put to a witness which is collateral or irrelevant to the issue, his answer cannot be contradicted by the party who asked the question, but is conclusive against him. *Lewis et al.* v. *Steiger et al.* *Cal.*, 434.

19. CRIMINAL LAW—IMPEACHING WITNESS—EVIDENCE OF ARREST AND KEEPING DOOR OF GAMBLING-HOUSE.—In a criminal prosecution, where the defendant is a witness in his own behalf, he cannot be impeached by evidence that on several occasions he was arrested for shooting at individuals; or that he knowingly acted as doorkeeper of a gambling-house. Such evidence will be presumed to have prejudiced the defendant. *People* v. *Hamblin.* *Cal.*, 308.

20. REFRESHING MEMORY FROM WRITING—WHEN PERMISSIBLE.—A witness cannot refresh his memory from an affidavit sworn to and subscribed by him *ex parte*, unless it appears that the witness had written the affidavit, or that it had been done under his direction at the time the facts occurred, or immediately thereafter, or at some other time when the facts were fresh in his memory, and that he knew that the same were correctly stated in the writing. *Morris* v. *Lachman.* *Cal.*, 305.

21. THE ADMISSION OF IMMATERIAL EVIDENCE, IF WITHOUT INJURY to the party complaining, will not warrant a reversal. *Adair* v. *Crane.* *Cal.*, 184.

22. INCOMPETENT EVIDENCE MUST BE OBJECTED TO.—A refusal to strike out evidence on the ground that it was incompetent and immaterial, is not error, if the same was given without objection on this ground. *Marks* v. *Bodie Bank.* *Cal.*, 327.

23. STRIKING OUT INCOMPETENT EVIDENCE—INSTRUCTIONS.—The admission of incompetent evidence will not, in general, warrant a reversal, if the court subsequently orders it stricken out, and instructs the jury to disregard it. *McKee et al.* v. *Bassick Mining Company.* *Col.*, 287.

24. LEADING QUESTIONS MAY BE STRICKEN OUT.—It is within the discretion of the trial court to strike out leading questions put to a party by his counsel. *Morris* v. *Lachman.* *Cal.*, 305.

25. HEARSAY TESTIMONY SHOULD BE STRICKEN OUT.—Hearsay testimony given by the plaintiff, relative to what he heard the defendant had said, is incompetent, and should be stricken out. *Id.*

26. PLAINTIFF CANNOT CONTRADICT AVERMENTS OF COMPLAINT.—Where, in an action to recover damages for abuse of the process of the court, the complaint alleges the fact of a judgment, not averring it to be void, the plaintiff cannot maintain the position that such judgment was void by reason of defective service of summons. Such position is inconsistent with the case presented in the complaint. *Burke* v. *Levy.* *Cal.*, 179.

27. AFTER ADMISSION OF PORTION OF WRITING, WHOLE MAY BE GIVEN.—When a portion of certain testimony given by witness, in another proceeding, is permitted to be read and given in evidence, the opposite side, under section 1854 of the code of civil procedure, may read the whole of such testimony. *Hobart* v. *Tyrrel.* *Cal.*, 155.

28. DECLARATIONS OF VENDOR—EVIDENCE—ACTION FOR ASSIGNMENT OF CONTRACT.—In an action against a subsequent purchaser to compel him to assign a contract for the sale of land, declarations of the vendor, made without the knowledge of, and not in the presence of, the defendant, are not admissible against him. *Taylor* v. *C. P. R. R. Co.* *Cal.*, 22.

See ACCESSARIES, 1; ACCOUNTING, 1; BONA FIDE PURCHASER, 2-4; BURGLARY, CONSIDERATION, 3, 4; CONTRACT, 9; CORPORATIONS, 5; DEEDS, 1-5; DELIVERY, 1; FINDINGS, 2, 9, 10, 12, 13, 15; FORGERY, 1; FRAUDULENT CONVEYANCES, 5; MURDER AND MANSLAUGHTER, 12-15; NEW TRIAL, 1, 2, 14, 15; NEGLIGENCE, 11; NONSUIT, 1; PRINCIPAL AND AGENT, 5, 6; RIGHT OF WAY, 1; VARIANCE; VERDICT; WITNESS.

EXECUTION.

1. EXEMPTION FROM EXECUTION—WATCH—WEARING APPAREL.—A watch of moderate value may be exempt from execution or assignment by any insolvent debtor, as "necessary wearing apparel." But in a controversy between the debtor and his assignee, if the former claims such watch as exempt, he must affirmatively show the facts which sustain his right to the exemption claimed. *McClung* v. *Stewart, Assignee, etc.* *Or.*, 112.

See INJUNCTION, 3; PARTNERSHIP, 3; REDEMPTION, 1; SALE, 6.

EXECUTORS AND ADMINISTRATORS.

1. FOREIGN EXECUTRIX CANNOT MAINTAIN ACTION IN THIS STATE.—Under section 1913 of the code of civil procedure, a foreign executrix cannot maintain an action in the courts of this state, either as such executrix, or in her individual name, to recover a debt due her testator, without having first obtained ancillary letters testamentary or of administration. *Lewis, Executrix, etc.* v. *Adams.* *Cal.*, 197.

2. THE SAME—AUTHORITY OF FOREIGN EXECUTOR OR ADMINISTRATOR OVER LOCAL ASSETS.—Under the provisions of the code of civil procedure regulating the settlement of the estates of decedents, the local administration of the estate of a deceased nonresident may be treated as ancillary, and after the payment of the local debts and expenses the surplus may, by order of the court, be delivered to the executor or administrator of the domicil; and to that end, the executor or administrator of the domicil may apply to the court, in this state, for such order; but, beyond that, no authority over the local assets is given to the executor or administrator of the domicil. *Id.*

See ATTACHMENT, 5; ESTATES OF DECEASED PERSONS; INSANITY.

EXPERTS.

See EVIDENCE, 5–7, 9.

FEES.

1. COUNTY GOVERNMENT ACT—FEES AND COMMISSIONS—PAYMENT INTO COUNTY TREASURY.—The word "fees," in its popular and common acceptation, includes the commissions, estimated by a percentage allowed by law on sums of money received or collected. The word is used with such signification in section 165 of the county government act of March 14, 1883. Such percentages should be paid, under section 168 of such act, into the respective county treasuries, and be set apart as a separate fund, known as the salary fund, to be applied to the payment of the official salaries. *Smith* v *Dunn, Controller, etc.* *Cal.*, 207.

2. FEES OF JURY AND REPORTER—PAYMENT OF—STAY OF PROCEEDINGS PENDING.—Under section 274 of the code of civil procedure, and the act of March 1, 1872, the court has power to stay the further trial of an equitable action until the parties in whose favor a verdict on special issues has been returned has paid the jury and reporter's fees. *Rhodes* v. *Spencer.* *Cal.*, 428.

3. WILLFUL COLLECTION OF ILLEGAL FEES—ACCUSATION FOR—FINDINGS.—In an action under section 772 of the penal code, upon a verified accusation against the defendant charging him, as constable, with knowingly and willfully collecting of plaintiff illegal fees: *Held*, that the findings were sufficient, and that the designation of them as the "decision" was immaterial. *Kennedy* v. *Gift.* *Cal.*, 177.

4. CLERK OF DISTRICT COURT—FEES FOR MAKING JUROR'S CERTIFICATES.—Under section 1922 of the general statutes the clerk of the district court is not entitled to compensation for making and delivering the certificates to the jurors showing the number of days they have attended at each term; nor for taking the jurors' affidavits concerning their attendance. *Board of County Commissioners of San Miguel Co.* v. *Long.* *Col.*, 592.

See CONSTITUTIONAL LAW, 7; PUBLIC OFFICERS, 3.

FINDINGS.

1. DECISION INCLUDES FINDINGS OF FACT.—Under section 633 of the code of civil procedure, the "decision" includes not only the conclusions of law, but the facts found; and a notice of intention to move for a new trial, which designates, as ground of the

motion, that the evidence does not warrant the decision, is the equivalent of the expression that the evidence is insufficient to support the findings. *Hibernia S. & L. S.* v. *Moore*. *Cal.*, 317.

2. EVIDENCE WHEN PRESUMED IN SUPPORT OF.—The sufficiency of the evidence to sustain the findings will not be considered on appeal, when the evidence is not before the court. In such case evidence in support of the findings is presumed. *Kendall* v. *Waters et al.* *Cal.*, 183.
3. NOT NECESSARY ON AFFIRMATIVE DEFENSE NOT SUPPORTED BY PROOF.—Where judgment is rendered for the defendant, a finding upon an affirmative defense, which is not supported by proof, is not necessary. *Peterson* v. *Hubbard*. *Cal.*, 487.
4. FINDINGS NOT REQUIRED WHEN DEMURRER HAS BEEN SUSTAINED.—No findings are required on issues presented by a cross-complaint, to which a demurrer has been sustained, and no amendments made. *Kendall* v. *Waters*. *Cal.*, 183.
5. SUFFICIENCY OF.—A finding that "all the allegations of the complaint herein are true," etc., and that "all the allegations of the answer herein are untrue," is sufficient. *Moore* v. *Clear Lake W. W.* *Cal.*, 332.
6. AMOUNT "DUE" MEANS OWING AND UNPAID.—Where issue is raised as to whether or not a promissory note had been paid, a finding that certain sums were "due" thereon, is equivalent to a finding that such sums are owing and unpaid. *Myers* v. *McDonald*. *Cal.*, 337.
7. VALIDITY OF ASSESSMENT—FACTS IN ISSUE.—Where the pleadings put in issue the validity of an assessment, any fact or facts going to show that no valid assessment was ever levied, are within the issues, and properly included in the findings. *Doane* v. *Barber*. *Cal.*, 505.
8. WAIVER OF FINDINGS—STIPULATION FOR—ESTOPPEL.—A party is estopped to object to the want of findings, if he stipulated in writing that findings should be waived, although such stipulation was not filed until after entry of judgment. *Dougherty* v. *Friermuth*. *Cal.*, 479.
9. EVIDENCE REVIEWED.—In an action to compel the assignment and for the specific performance of a contract for the sale of land, the findings reviewed and held supported by the evidence. *Taylor et al.* v. *Central Pacific Railroad Co. et al.* *Cal.*, 22.
10. WHERE THERE IS A SUBSTANTIAL CONFLICT in the evidence, the findings will not be disturbed. *Id.*
11. FINDINGS OF FACTS ADMITTED BY THE PLEADINGS are not necessary. *Id.*
12. EVIDENCE—FINDINGS.—Where the evidence is conflicting, the judgment will not be reversed on the ground that the findings are not supported by the evidence. *Peterson* v. *Doe et al.* *Cal.*, 417.
13. FINDINGS NOT DISTURBED WHEN EVIDENCE IS CONFLICTING.—Where the evidence as to whether a transfer of property was a sale or as security, is conflicting, the findings will not be disturbed. *Burke* v. *Levy et al.* *Cal.*, 179.
14. JUDGMENT REVERSED FOR FAILURE TO FIND ON THE ISSUES. *Casey et al.* v. *Jordan et al.* *Cal.*, 484.
15. THE FINDINGS REVIEWED AND HELD SUSTAINED by the evidence. *Yesler* v. *De Koslowski*. *Wash.*, 193.

See CONSIDERATION, 1, 6; CONTRACT, 12; PLEADINGS, 5; STATUTE OF LIMITATIONS, 8, 9.

FIRE INSURANCE.

See INSURANCE.

FORECLOSURE.

See LIEN, 1; MECHANIC'S LIENS, 1, 2, 6, 7, 10, MORTGAGE, 1, 3, 5.

FORFEITURE.

See MINES AND MINING, 3, 14; PROMISSORY NOTE, 1.

FORGERY.

1. FORGERY—COUNTERFEIT PROMISSORY NOTE—EVIDENCE OF DAMAGE.—In a prosecution for forgery, in having feloniously, etc., uttered, published, and passed to one E. a counterfeit paper, in writing, as a genuine promissory note of one F., with the intent to prejudice, defraud, and damage the said E., evidence is admissible that, by reason of the passing of the paper, E. was damaged by being induced to make a journey, and was put to expense therein. *People* v *Phillips* *Cal.*, 759.

FRAUD.

1. FRAUD, HOW ALLEGED.—In charging fraud, the facts must be stated showing in what the fraud consisted. A general allegation that a party acted fraudulently, or made fraudulent statements, is not enough. *Mesner* v. *Knapp.* *Or.*, 648.

2. FRAUDULENT VIOLATION OF CONDITIONS OF CONTEST.—In an action to recover a prize offered by an association, for the successful competitor in a horse-race, an answer setting up the rules and regulations of the society, which governed in competing for any prize or purse upon its track, and facts showing that the plaintiff fraudulently entered a horse disqualified under such rules, constitutes a good defense. *Id.*

3. SUIT TO RESCIND CONTRACT ON THE GROUND OF FRAUD.—A court of equity will decree a rescission of a contract obtained by the fraudulent representations or conduct of one of the parties thereto, on the complaint of the other, when it satisfactorily appears that the party seeking the rescission has been misled in regard to a material matter by such representation or conduct, to his injury or prejudice. *Seeley* v. *Reed.* (*U. S. Cir. Ct.*) *Or.*, 83.

4. IDEM.—But when the facts are known to both parties, and each acts on his own judgment, the court will not rescind the contract because it may or does turn out that they, or either of them, were mistaken as to the legal effect of the facts, or the rights or obligations of the parties thereunder; and particularly when such mistake can in no way injuriously affect the right of the party complaining under the contract, or prevent him from obtaining and receiving all the benefit contemplated by it, and to which he is entitled under it. *Id.*

5. FALSE REPRESENTATIONS—EVIDENCE—FINDINGS.—In an action to recover damages for certain false and fraudulent representations made by the defendant, whereby the plaintiff was induced to purchase certain real estate, supposing it to be other real estate, the findings reviewed at length, and held supported by the evidence. *Phinney* v. *Hubbard.* *Wash.*, 388.

See ASSIGNMENT, 2; ASSIGNMENT FOR BENEFIT OF CREDITORS, 1; FRAUDULENT CONVEYANCES; INFRINGEMENT, 1; RIGHT OF WAY, 1; TRADE-MARK, 1.

FRAUDULENT CONVEYANCES.

1. CREDITOR, WHEN MAY ATTACK.—A creditor to whom an order has been given for an article which is afterwards furnished, may attack the *bona fides* of a deed made by the debtor during the interval between the date of the order and the time of delivery. *Crawford* v. *Beard.* *Or.*, 291.

2. SUBSEQUENT CREDITORS, WHEN MAY ATTACK.—A conveyance may be attacked by subsequent creditors, if made with the intent to put the property out of the reach of debts, which the grantor, at the time of conveyance, intended to contract, and which he does not intend to pay, or has reasonable grounds to believe that he may not be able to pay. *Id.*

3. FRAUDULENT INTENT, HOW DETERMINED.—Whether a conveyance was intended to defraud the creditors of the grantor may be inferred from the nature and character of the transaction itself, or from facts and circumstances connected with it. If the necessary result is to place the debtor's property beyond the reach of legal process, so as to delay creditors, it will be presumed to be done with a fraudulent intent; but when the act is apparently regular and fair upon its face, the intent must be gathered from the surroundings. The circumstances surrounding the deed in question considered, and held that it did not appear to have been given for a sufficient consideration. *Id.*

4. FRAUDULENT CONVEYANCE MAY STAND AS SECURITY.—A deed obtained under suspicious or inequitable circumstances, or which is only constructively fraudulent, may be permitted to stand, in equity, as security for any purpose of reimbursement or indemnity. *Id.*

5. DECLARATIONS OF GRANTOR—FINANCIAL CONDITION OF GRANTEE—EVIDENCE.—In an action to set aside a deed for fraud on the creditors of the grantor, evidence of the declarations of the grantor, made after the execution of the deed, and that the grantee was not known to have any property at the time of purchasing, are without weight. *Id.*

GARNISHMENT.

1. RIGHTS OF ATTACHING CREDITORS.—Attaching creditors, as against the garnishee, acquire the rights of the attachment debtor, and no more. *Baker et al.* v. *Eglin.* *Or.*, 530.

2. AGREEMENT TO PAY DEBTS OF ANOTHER.—Where A, for a valuable consideration, agrees with B to pay his debt to C, the latter can enforce the contract against A. Under such circumstances, creditors of B cannot hold A liable by process of garnishment to the extent the contract between them remained unexecuted at the date of the garnishment. *Id.*

3. ORDER MUST BE SERVED ON GARNISHEE—APPEARANCE BY ATTORNEY.—An order directed to a garnishee, to answer concerning the property of a judgment debtor, alleged to be in his possession, should be served personally on the garnishee, and not on his attorney. But service made on the latter, who thereupon appears in court, and represents the garnishee on a motion for judgment, will be considered equivalent to a personal service, under section 520 of the code. *Carter, Rice, & Co.* v. *Koshland.* *Or.*, 383.

4. NOTICE NEED NOT SPECIFY PARTICULAR DEBTS ATTACHED.—Under subdivision 3, of section 147, of the civil code, to make an attachment of debts effectual, it is not necessary that the notice, to be served with the certified copy of the writ, should specify the debts supposed to be owing by the garnishee. A general notice by the sheriff that he has attached the debts, property, etc., belonging or owing to the defendant in the attachment suit, is sufficient. *Id.*

5. JUDGMENT AGAINST GARNISHEE.—Under the act of October 25, 1878, where the judgment creditor has obtained a judgment the property attached be sold to satisfy his debt, he cannot obtain a general judgment against the garnishee for the amount of the debt. *Id.*

GRAND JURY.

See CRIMINAL LAW, 13.

GUARANTY.

See LETTER OF CREDIT.

GUARDIAN AND WARD.

1. ESTATE OF MINORS—BOND OF GUARDIAN—SUBSTITUTED BOND MAY BE GIVEN—SURETIES.—Under sections 78 et seq., of the probate act, made applicable to guardians by the act of March 27, 1857, the probate court had power to take a new bond from a guardian of the estate of a minor, to take the place of a former bond. After such new bond has been given as a substitute for the former bond, sureties on the latter are not responsible for any defaults of the guardian occurring subsequent to the date of its filing. *Spencer* v. *Houghton.* *Cal.*, 215.

2. THE SAME—ACCOUNTING BY GUARDIAN—SERVICE OF CITATION ON GUARDIAN—MAY BE BY PUBLICATION.—An order of the probate court, adjudging the amount due by such guardian, upon an accounting instituted by the ward, is not binding upon the sureties on the guardian's bond unless notice of the proceeding was given to the guardian, by citation, in conformity to sections 1707 et seq. of the code of civil procedure. The mere service on him of an order of the court directing him to file an account is not sufficient. Under section 1709 of such code, the citation is to be served in the same manner as a summons in a civil action; consequently, if the guardian has left the state, the citation should be served on him by publication. Such service by publication is sufficient to give the court jurisdiction to bind the guardian by its order made upon a settlement of the account. *Id.*

3. SURETIES ON BOND—RELEASE OF ONE RELEASES ALL.—Prior to the adoption of section 1543 of the civil code, providing that "the release of one of two or more joint debtors, does not extinguish the obligations of any of the others," . . . . the release of one of the sureties on the bond of a guardian, was a release of all; and if the contract of suretyship was entered into prior to the enactment of such section, and subsequently one of the sureties is released, all are released. The right of the co-sureties to be released under such contract is a vested right of which they could not be deprived by subsequent legislation. *Id.*

4. GUARDIANSHIP OF MINOR—JURISDICTION OF SUPERIOR COURT TO HEAR PETITION FOR.—Where a petition for letters of guardianship over the person of a minor is presented and filed in the superior court of one county, and citation is issued and served on the parties interested, such court has jurisdiction to hear and determine whether the minor is a resident of that county, and whether the petitioner is a proper person to be appointed guardian. Its jurisdiction so to proceed is not ousted by the fact

that subsequent to the service of the citation the party served obtained the issuance of letters of guardianship to himself in the superior court of another county. *In re Guardianship of Laura Danneker, a Minor.* *Cal.*, 140.

HIGHWAY.

See STREETS AND ROADS.

HOMESTEAD.

1. DECLARATION OF HOMESTEAD BY WIFE—SUBSEQUENT TRUST DEED BY HUSBAND IS VOID.—A trust deed, executed and acknowledged by a husband alone, to his wife, is void as against a prior declraation of homestead, made by the wife, on the property. Under section 1243 of the civil code, such homestead could be abandoned only by a declaration or a grant executed and acknowledged by the husband and wife. *Graves et al.* v. *Baker.* *Cal.*, 336.
2. STATEMENT OF VALUE.—A statement in a declaration of homestead that the cash value thereof is "about four thousand dollars," is a sufficient statement of the value of the homestead. *Graves* v. *Baker.* *Cal.*, 340.

HUSBAND AND WIFE.

1. HUSBAND'S LIABILITY FOR NECESSARIES FURNISHED WIFE—LIABILITY, HOW ALLEGED. The complaint, in an action brought against a husband for necessaries furnished his wife, under section 174 of the civil code, must allege that the goods were sold and delivered to the defendant. An averment in respect to furnishing the goods to the wife, etc., is not sufficient. The absence of such necessary averment may be taken advantage of on appeal, although no demurrer to the complaint was filed. *Nissen* v. *Bendixsen.* *Cal.*, 564.

ILLICIT COHABITATION.

See CONSIDERATION, 1.

INDIAN RESERVATION.

1. INDIAN SAW-MILL.—Lumber made at the saw-mill on the Grand Ronde Indian reservation is in fact the "property" of the Indians thereon, and not that of the United States, within the purview of section 3618 of the revised statutes; and the agent, subject to the instructions of the commissioner of Indian affairs, may dispose of any portion of the same and apply the proceeds to the support of the mill or otherwise for the benefit of the Indians, without reference to section 3617 of the revised statutes requiring money received for the use of the United States to be deposited to its credit. *United States* v. *Sinnott et al.* (*U. S. Cir. Ct.*) *Or.*, 718.
2. DOUBLE PAYMENT OF SALARY.—The superintendent of Indian affairs in Oregon returned to the department two vouchers for the payment by him of the salary of the agent of the Grand Ronde reservation for the second quarter of 1873, each being marked "triplicate," from which the accounting officers assumed that the salary was paid twice, and charged the agent with the amount of such payments in the settlement of his official accounts: *Held*, 1. That on the face of the transaction it was apparent that these two papers were but parts of one voucher taken in triplicate, and that there was but one payment; and 2. That if there had been two payments, the agent, although liable for the excess, as an individual, as for money had and received to the use of the United States, was not liable therefor on his bond. *Id.*
3. MONEY PAID BY AGENT WITHOUT AUTHORITY.—The defendant Sinnott employed a person on the reservation aforesaid as "superintendent of farms and mills," and in reporting the fact to the commissioner, said that he did so at the instance of "some political friends," but there was really no necessity for the employment, and advised that it be disapproved, which was done; but the agent continued the person in such employment and paid him therefor, and on settlement of his accounts at the treasury, one thousand five hundred dollars thereof was disallowed: *Held*, that the payments being not only without authority but contrary thereto, were illegal, and the agent and his sureties are liable therefor. *Id.*

INDORSEMENT.

See CONSIDERATION, 5.

INFANTS.

1. MINOR OVER EIGHTEEN YEARS—PROMISSORY NOTE—LIABILITY TO ENDORSER DISAFFIRMANCE OF CONTRACT.—Under section 35 of the civil code, where an infant over the age of eighteen years executes a promissory note, the consideration for which he receives, and upon maturity the note is paid by an indorser, the maker cannot disaffirm his contract with such indorser without refunding to him the amount advanced in taking up the note. *Combs* v. *Hawes. Cal.*, 148.

See DIVORCE, 3, 4.

INFORMATION AND BELIEF.

See PLEADING, 3.

INFRINGEMENT.

1. INFRINGEMENT OF NEWSPAPER TITLE—INTENTIONAL FRAUD.—In the absence of a showing of intentional fraud, the use of the name "The Northwest News," as applied to a newspaper, will not be restrained at the instance of a newspaper having a prior right to use the name of "The New Northwest." *Duniway Publishing Co.* v. *Northwestern Printing and Publishing Co. Or.*, 523.

See COPYRIGHT, 4.

INJUNCTION.

1. JUDICIAL CONTROL OF OFFICIAL ACTION.—As a means of controlling the official action of public officers, in a matter affecting private rights, the writ of injunction is the correlative of the writ of *mandamus;* and, whenever, in such case, the latter will issue to compel affirmative action, the former may issue to restrain the same; but neither can be used to control or direct official judgment or discretion. *Koehler, Receiver, etc.* v. *Barin, Register, etc. et al.* (*U. S. Cir. Ct.*) *Or.*, 64.
2. INJUNCTION, WHEN WILL NOT ISSUE TO RESTRAIN REGISTER AND RECEIVER.—An injunction will not issue to restrain the register and receiver from receiving and allowing applications to enter certain lands within their district, although it may appear, in the judgment of the court, that the same belong to the plaintiff by legislative grant, so long as there is room for difference of opinion on the question or its determination involves the exercise of official judgment. *Id.*
3. INJUNCTION RESTRAINING EXECUTION—CASE IN JUDGMENT.—The complaint alleged that one Flynn was indebted to the defendant in the sum of four hundred and thirty-seven dollars, for which amount he, and this plaintiff, gave their promissory note to defendant. Plaintiff was in reality but a surety for Flynn, and signed the note without consideration and as an "accommodation surety" for Flynn, all of which was well known to the defendant. Flynn afterward sold certain personal property to defendant, sufficient to pay all of the note except one hundred and thirty-seven dollars, the value of which Flynn directed and defendant agreed to indorse, upon the note, but did not do so, and credited the same on other demands by him held against Flynn. Upon the maturity of the note, plaintiff urged defendant to bring suit thereon against Flynn who at that time had property sufficient to pay the same. Subsequently defendant brought suit on the note against Flynn and this plaintiff, sued out a writ of attachment and caused the same to be levied upon sufficient property of Flynn to satisfy the demand. Plaintiff was served with summons in that cause, and thereupon called upon defendant, who, in a conversation, said he had sued for but did not expect to recover the whole amount of the note; that this plaintiff need give himself no uneasiness about the suit, as the claim was abundantly secured under the attachment; that he, Kriess, would settle the matter with Flynn; that plaintiff need not answer in the cause, and that he did not expect or intend to pursue him, or look to him for any portion of the claim. Plaintiff relied upon these statements, and in consequence thereof, did not answer, and judgment was taken against him and Flynn by default, for the whole amount of the note. After the rendition of the judgment, defendant did not enforce the same against Flynn, but wrongfully and in fraud of the rights of plaintiff, discharged and released his attach-

ment on the property of said Flynn, which would have paid the judgment in full, and ever since has held and still holds the judgment against plaintiff, and threatens to, and unless restrained will, issue execution thereon against the property of plaintiff and enforce the same: *Held*, that the complaint stated facts entitling plaintiff to an injunction against the execution of such judgment. *Kelly* v. *Kriess.* *Cal.*, 466.

4. DIVERSION OF WATER—RIGHTS OF APPROPRIATOR—ALLEGATIONS OF COMPLAINT.—In an action by an appropriator of the waters of a natural stream, to restrain an unlawful diversion thereof, the complaint need not show that the plaintiff is in a position to use the water himself, or that he is in any position which gives him a right to furnish it to others. An allegation that he has a right to the use and enjoyment of the property is sufficient. *Moore* v. *Clear Lake Water Works.* *Cal.*, 332.
5. EQUITY WILL RESTRAIN CONTINUOUS DIVERSION.—Equity will restrain the continuous wrongful diversion of water, at the instance of a prior appropriator thereof, although no actual damages are averred or proved. Equitable relief is granted, in such cases, to prevent the wrongful acts from ripening into a right. *Id.*
6. DESTRUCTION OF NAVIGABLE LAKE—SPECIAL INJURY.—One who is, and for many years has been, the owner of a lumber mill upon the banks of a navigable lake, which it is necessary for him to use in transporting logs to his mill, is specially injured by a destruction of the navigation of such lake, and may maintain, in his own name, an action to restrain the injury. *Crescent Mill and Transportation Co.* v. *Hayes et al.* *Cal.*, 335.

See CONTEMPT, 1; COPYRIGHT; UNITED STATES COURTS, 1.

INSANITY.

1. INSANITY OF OFFICER—VACANCY, WHEN CREATED—COMMISSION OF LUNACY.—Section 996 of the political code, providing that an office becomes vacant on the happening of the incumbent's insanity, "found upon a commission of lunacy issued to determine the fact," only applies to a commission issued out of chancery, and not to the ordinary statutory proceeding taken to send a person to the insane asylum. *In re Estate of Moore, Deceased.* *Cal.*, 561.
2. THE SAME—INSANITY OF ADMINISTRATOR—COMMITMENT TO ASYLUM—VACANCY IN ADMINISTRATION.—The commitment of an administrator to the insane asylum does not create an entire vacancy in the administration of the estate, under sections 1425 and 1426 of the code of civil procedure. During such commitment the administrator is incapable of executing his trust; but when his incapacity had been removed and he had again entered upon the discharge of his duties as administrator, a petition asking for the appointment of another person, on account of the former incapacity of the administrator, comes too late. *Id.*

INSOLVENCY.

1. INSOLVENCY—CREDITORS RESIDENT OF STATE—ASSIGNMENT BY NON-RESIDENT.—Assignments of claims, made by non-resident creditors to persons residing in this state, without consideration, and solely to enable such persons to become petitioning creditors in a proceeding in involuntary insolvency against the debtor, cannot make of such assignees "creditors, residents of this state," within the meaning of section 8 of the insolvency act of 1880. *In re Baum.* *Cal.*, 502.

INSTRUCTIONS.

1. INSTRUCTIONS PRESUMED CORRECT IN ABSENCE OF EVIDENCE.—A refusal to give instructions asked for in a prosecution for murder will not be considered on appeal when the transcript fails to contain the evidence. In such case, the instructions given will be presumed correct if such a state of the evidence is conceivable as may have rendered them correct. *People* v. *Johnson.* *Cal.*, 302.
2. INSTRUCTIONS—ARGUMENTATIVE ARE ERRONEOUS.—An instruction in such action to the effect that if the defendant did not know the plaintiff personally he could not have referred to her or pointed her out as the object of the accusation contained in his language, is erroneous, as being argumentative and an instruction upon the weight of the testimony. *Morris* v. *Lachman.* *Cal.*, 305.
3. AN INSTRUCTION THAT EVIDENCE INTRODUCED "TENDS TO PROVE" a matter is not erroneous. *Id.*

4. INSTRUCTIONS ALREADY GIVEN NEED NOT BE REPEATED.—In such case the refusal to give an instruction on the question of self-defense is not error, if the same has already been given in other instructions. *People* v. *Sullivan*. *Cal.*, 156.
5. REFUSAL TO GIVE INSTRUCTION REQUESTED is not error if it has already been given in substance. *Minich* v. *People*. *Col.*, 580.
6. A REFUSAL TO GIVE AN INSTRUCTION which has already been given in substance is not error. *McKee* v. *Bassick M. Co.* *Col.*, 287.
7. THE REFUSAL TO GIVE AN INSTRUCTION THAT HAS ALREADY BEEN GIVEN in substance, is not error. *People* v. *Robertson*. *Cal.*, 159.

See ACCESSARIES, 1; EVIDENCE, 23.

INSURANCE.

1. FIRE INSURANCE—NOTICE TO AGENT OF INSURER—WHEN NOT BINDING.—Where an insurance company, in its contract with the insured, expressly exempts itself from being bound by "any act or statement" not contained in the written application for the policy, or indorsed on the policy, notice to its agent as to anything different from what the policy and application contained, will not bind the company. *Enos* v. *Sun Insurance Company*. *Cal.*, 34.
2. THE SAME—WAIVER OF CONDITIONS MUST BE INDORSED ON POLICY.—So also the local agent of the company cannot waive any of the provisions of the policy, except by written indorsement made on the policy or on the application, when the policy provides that anything less than a distinct, specific agreement, indorsed or attached to the policy, shall not be construed as a waiver of any condition or provision of the policy. *Id.*
3. THE SAME—WHAT INCLUDED IN WORD "BUILDING"—FISHING SCOW.—In determining whether a fishing scow was, in the policy of insurance, included in the word "building," and thereby affected by all the terms and conditions of the policy as a building, evidence that similar scows, as well as the one in question, were used and occupied as buildings, for purposes of residence and business, is admissible. *Id.*
4. FIRE INSURANCE—ACTION ON POLICY MUST BE BROUGHT WITHIN TIME LIMITED. In an action on an insurance policy, which contains a clause that any suit or action thereon should be commenced within twelve months after the loss: *Held*, that the evidence did not sustain a finding that the delay in bringing the present action was caused by the conduct of the defendant; that, after the plaintiff had been informed of the position of the defendant, he had ample time, within the year, to commence his action. *Garido* v. *American Central Ins. Co. of St. Louis*. *Cal.*, 180.
5. LIMITATION ON RIGHT TO SUE ON A POLICY OF INSURANCE.—A policy of insurance contained in effect this stipulation: 1. No action shall be commenced thereon to recover for a loss thereunder until the amount thereof was ascertained by agreement or arbitration; and 2. No such action shall be maintained unless commenced within one year after the date of the fire from which the loss occurred: *Held*, that unless the assured was prevented by the action or non-action of the insurer, in the matter of ascertaining the amount of the loss, he must commence his action therefor within the time specified in the stipulation. *Thompson, Receiver*, v. *The Phœnix Insurance Company*. (*U. S. Cir. Ct.*). *Or.*, 137.
6. REFORMATION OF POLICY.—A demurrer to a bill for the reformation of a policy of insurance will be sustained, when it appears that by reason of the lapse of time no action can be maintained thereon for any cause, when reformed. A court will only decree the reformation of an instrument as a means of enabling a party thereto to assert or maintain some right thereunder. *Id.*

INTENT.

See ASSIGNMENT, 1; DEEDS, 3; FRAUDULENT CONVEYANCES, 3.

INTEREST.

See CONVERSION, 3; ESTATES OF DECEASED PERSONS, 4; PROMMISSORY NOTES, 1.

INTERPLEADER.

1. UNITED STATES COURTS OF EQUITY—STATE STATUTES ENLARGING EQUITABLE RIGHTS APPLICABLE TO.—A state statute merely regulating procedure is not applicable to United States courts of equity. But where a state statute enlarges a party's equit-

able rights, by creating a new remedy under given circumstances, such equitable rights may be enforced in the United States circuit court. *Wells, Fargo, & Co.* v. *Miner et al.* (*U. S. Cir. Ct.*) *Cal.*, 130.

2. THE SAME—CALIFORNIA STATUTE ENLARGING RIGHT OF INTERPLEADER.—Section 386 of the California code of civil procedure provides that "whenever conflicting claims are or may be made upon a person for or relating to personal property, or the performance of an obligation, or any portion thereof, such person may bring an action against the conflicting claimants, to compel them to interplead, and litigate their several claims among themselves. The action of interpleader may be maintained, and the applicant or plaintiff be discharged from liability to all or any of the conflicting claimants, *although their titles or claims have not a common origin, or are not identical, but are adverse to and independent of one another.*" *Held*, that such provision is not a mere regulation of procedure; that it creates a new right by enlarging the scope of the remedy; and that the right to interplead adverse claimants, so created, may be enforced in equity in the United States circuit court. *Id.*

3. THE SAME—INTERPLEADER UNDER ORIGINAL CHANCERY PRACTICE—CASE IN JUDGMENT.—The defendant S. sold a mining claim to the defendant, the S. D. Co., for ten thousand dollars, and received in payment a check for that amount on the Bank of California. S. deposited the check with the complainant, who thereupon paid him two thousand five hundred dollars, and issued to him a certificate of deposit for seven thousand five hundred dollars, payable to him "or order on return of this certificate, properly indorsed." By mesne assignments before maturity, the certificate came into possession of defendant M., who claims to be the owner and holder thereof, but he is alleged not to be a holder in good faith. The S. D. Co. claims that in the sale of the mine S. made certain false and fraudulent representations, by reason whereof they are entitled to rescind the sale and recover back everything of value which they paid to S. The defendants, M. and S. D. Co., have each sued the complainant, the former to recover on the certificate of deposit, and the latter to enjoin its payment until the determination of a suit brought by them to rescind the sale. The complainant thereupon brought the present suit in equity to compel the defendants to interplead, and to restrain the prosecution of the actions against them respecting the certificate until the determination of the present suit. *Held*, that the case is a proper one for an interpleader, under section 386 of the code of procedure of California, and intimated that under the chancery practice as it originally existed, before the enlargement of the scope of the remedy by said section, the complainant was entitled to interplead the defendants, because the same thing—the certificate of deposit—is claimed by both the S. D. Co. and M.; their claims being derived from a common source—the original transaction between the S. D. Co. and S.; and the complainant claiming no interest against and having incurred no independent liability to either of the defendants. *Id.*

JOINT DEBTORS.

See COUNTER-CLAIM, 1.

JUDGMENT.

1. JUDGMENT ON PLEADINGS—DEFENDANT MAY HAVE—AMENDMENT OF COMPLAINT.—Where a complaint fails to state facts sufficient to constitute a cause of action, the court may on motion give judgment for the defendant on the pleadings. On such motion, if the plaintiff makes application, the court should permit him to amend. *Kelley* v. *Kriess.* *Cal.*, 466.

2. ENTRY OF, UPON DEFAULT OR CONFESSION.—Whether a statute authorizing the clerk of the court to enter judgment upon default or confession, without an order of court, is constitutional not decided. The statute of Oregon authorizing such entry having been in force for nearly twenty years, and acquiesced in by the bench and bar, should be upheld in accordance with the maxim, *Communis error facit jus.* *Crawford* v. *Beard.* *Or.*, 291.

3. REVERSED JUDGMENT NO PART OF JUDGMENT ROLL.—A judgment of the district court which has been reversed on appeal forms no part of the judgment roll, and need not be introduced in evidence therewith. *Albion Con. M. Co.* v. *Richmond M. Co.* *Nev.*, 100.

4. REVERSAL OF JUDGMENT—RETRIAL, WHEN MUST BE HAD.—When the supreme court reverses a judgment on motion of respondent, and orders that judgment "be and the same is hereby reversed, with costs, and cause remanded," the parties to

the action have a right to a retrial of the issues, unless there is something in the opinion of the court, or the order made by it, restricting the operation of the words "reversed and remanded." In such case it is error for the lower court to refuse a retrial. *Myers* v. *McDonald et al.* *Cal.*, 337.

5. WHERE THE EVIDENCE IS CONFLICTING, THE JUDGMENT WILL NOT BE REVERSED on the ground that it was insufficient to justify the verdict. *Gonzales et al.* v. *Cobliner et al.* *Cal.*, 329.

See AMENDMENT, 2; APPEAL, 8; CLAIM AND DELIVERY, 1, 2; COSTS, 1; CRIMINAL LAW, 16; DEFAULT, 1–3; GARNISHMENT, 5; MECHANIC'S LIEN, 10; PARTITION, 1; REFERENCE, 1.

JURISDICTION.

See JUSTICE'S COURT, 5, 10.

JURY AND JURORS.

1. CHALLENGE FOR CAUSE—PEREMPTORY CHALLENGE.—Admitting that the finding of the trial court upon a challenge of a juror for cause is reviewable, an erroneous denial of such challenge will not warrant a reversal if the juror was afterwards peremptorily challenged by the defendant, who subsequently went to trial without having exhausted all the peremptory challenges to which he was entitled. *Minich* v. *People.* *Col.*, 580.

2. BIAS OF JUROR—CHALLENGE FOR CAUSE.—A challenge for cause interposed by the prosecution is properly allowed if the juror testifies on his *voir dire* examination that he had formed and expressed a positive opinion concerning the defendant's guilt or innocence; that such opinion was obtained from statements made to him by witnesses; that he had business relations with a codefendant of the prisoner; and that he supposed himself to entertain a feeling of "bias at the outset." *Id.*

3. OATH OF JURY—DULY SWORN, WHAT IMPLIES.—A recital in the record that the jury were duly sworn implies that the oath was administered with the requisite formality and solemnity; that the jurors in open court were required to hold up their hands and promise to perform the duties specified; and that there was an appropriate reference to the Deity, such as "in the presence of the everliving God," or "so help me God." *Id.*

4. FORM OF OATH—SUFFICIENCY OF.—It is sufficient if the jury is sworn to "well and truly try the issue joined, and a true deliverance make between the people and the prisoner at the bar, and a true verdict render according to the law and the evidence." The expression "whom you shall have in charge" is not material, and its omission does not vitiate the oath. *Id.*

5. CHALLENGE TO JURORS—TRIAL OF—ACTUAL AND IMPLIED BIAS.—A challenge to a panel of jurors, summoned upon an open venire, on the ground of bias on the part of the officer summoning, should show upon its face whether it was taken for implied or actual bias. If for implied bias, it is the duty of the court to decide upon the objection; if for actual bias, triers should be appointed by the court for that purpose; if the defendant does not ask for the appointment of triers, but submits evidence in support of the challenge to the court, he waives his right to an examination by triers. In such case the decision of the court is final, and not the subject of exception, and cannot be reviewed on appeal. *State* v. *Gray.* *Nev.*, 72.

6. JURY CANNOT RECEIVE EVIDENCE OUT OF COURT. *Rodgers* v. *C. P. R. R. Co.* *Cal.*, 20.

See CRIMINAL LAW, 6, 13; FEES, 2; MECHANICS' LIEN, 2; NEW TRIAL, 4; PLEADINGS, 6.

JUSTICE'S COURT.

1. JUSTICES OF THE PEACE—ACT OF APRIL 1, 1880, CONSTRUED.—Section 103 of the act of April 1, 1880, entitled "An act to amend part 1 of the code of civil procedure, and each and every title, chapter, article, and section of said part 1, and substituting a new part 1 to take the place thereof in said code, relating to courts of justice and various officers connected therewith," was intended to apply to justices of the peace elected at the general election in 1879, as well as to justices of the peace elected after the act took effect. *Shearer* v. *City of Oakland.* *Cal.*, 36.

2. APPEAL—DISMISSAL—NOTICE OF MOTION.—On appeal from the justice's court, under section 389 of the civil code, notice of all motions set for hearing in the county court must be given to the opposite party, by entering the same in the motion-book, and a

dismissal of an appeal on motion, of which no notice has been given, is erroneous. *Thorne* v. *Ornauer*. *Col.*, 273.

3. APPLICATION FOR ORDER IS A MOTION.—An application for a rule commanding plaintiff to refund the docket fee, or in default thereof submit to a dismissal of his appeal, is an application for an order, and hence a motion. *Id.*
4. WRITTEN PLEADINGS ARE NOT REQUIRED TO BE FILED in the county court in appeals from the justice's court. *Id.*
5. JURISDICTION OF JUSTICE SHOWN BY EVIDENCE ALIUNDE.—The failure of a justice to record in his docket the nature of the cause of action may be cured in the future proceedings by proofs *aliunde* establishing the justice's jurisdiction. *Id.*
6. APPEAL FROM JUSTICE'S COURT—TIME TO FILE NEW BOND MAY BE EXTENDED.—Under section 1986 of the general statutes the court, in cases on appeal from justices of the peace, when the appeal bond is found insufficient or informal, may fix a reasonable time within which the party appealing may execute a good and sufficient bond; upon good cause shown such time may afterwards be extended; or if the appellant has attempted to comply with the order, by filing within the time limited a new bond, which is adjudged insufficient, the court may, in the exercise of a reasonable discretion, make another order for the filing of a second new bond to cure the defects. *McKee* v. *Bassick M. Co.* *Col.*, 287.
7. APPEAL FROM JUSTICE'S COURT—TRIAL IN SUPERIOR COURT.—The taking of an appeal from a justice's court on questions of law and fact does not give the appellant a right to have the action tried *de novo*, unless a trial upon the issues of fact as made in the justice's court had already been had in that tribunal. Thus, where issue is joined in the justice's court, but the action is dismissed, without trial, by the justice, upon the ground that the complaint, although actually filed, was not so indorsed, on appeal the superior court cannot try the issues. It should reverse the judgment, and send the case back for trial on the issues tendered by the pleading. *Myrick et al.* v. *Superior Court of Contra Costa County*. *Cal.*, 237.
8. APPEAL ON QUESTIONS OF LAW AND FACT—TRIAL IN SUPERIOR COURT.—Where an appeal from the justice's court has been taken on questions of law and fact, the superior court must itself proceed with the trial, under section 976 of the code of civil procedure. It cannot reverse the judgment and remand the cause to the justice's court for further proceedings. *Acker* v. *Superior Court*. . *Cal.*, 538.
9. APPEAL FROM JUSTICE'S COURT—TIME IN WHICH TO PERFECT—ORDER OF FILING NOTICE AND BOND IMMATERIAL.—Where a notice of appeal from a justice's court is served and filed, and the undertaking on appeal is filed within the time prescribed by statute, the superior court obtains jurisdiction, and cannot dismiss the appeal for want of jurisdiction. The mere order in which the acts necessary to the perfection of the appeal are done is immaterial, when done within the time limited by the statute. *Hall* v. *Superior Court of Eldorado County*. *Cal.*, 170.
10. JURISDICTION—SUPREME COURT—APPEAL.—The supreme court has no jurisdiction of an appeal from the superior court in an action originally brought in the justice's court for an amount less than three hundred dollars. *Holmes* v. *Warren*. *Cal.*, 463.

LACHES.

See STATUTE OF LIMITATIONS, 1–6; TRUST, 3.

LEASE.

1. LEASE IN WRITING—VERBAL AGREEMENT FOR ALTERATIONS OF TERMS—WHEN NOT BINDING ON GRANTEE.—A verbal agreement between the lessor and lessee, by which the terms of a written lease are altered, if not acted upon by the lessee until after the lessor had conveyed his estate, is not binding upon the grantee of the lessor. *Taylor* v. *Soldati*. *Cal.*, 181.

See CONSPIRACY, 1.

LANDLORD AND TENANT.

See EJECTMENT, 3.

LETTER OF CREDIT.

1. LETTER OF CREDIT DEFINED—GENERAL AND SPECIAL LETTER.—A letter of credit may be defined to be a letter of request whereby one person requests some other person

to advance money or give credit to a third person, and promises that he will repay or guarantee the same to the person making the advancement. It is called a general letter of credit when it is addressed to all persons in general, requesting such advance to a third, and a special letter of credit when addressed to a particular person by name. *Lafargue et al.* v. *Harrison et al.* *Cal.*, 683.

2. LIABILITY OF WRITER UNDER GENERAL LETTER.—When addressed to all persons it is in effect a request made to any person to whom it may be presented, and any one may accept and act upon the proposition contained in it, and when he does so that which before was indefinite and at large becomes definite and fixed. A contract immediately springs up between the person making the advancement and the writer of the letter, and it is thenceforward the same thing in legal effect as though the name of the former had been inserted in the letter in the beginning. *Id.*

3. LIABILITY OF WRITER UNDER SPECIAL LETTER.—And the same legal effect follows action by the person to whom a special letter of credit is addressed. He has the right to act upon it, and when he accepts the letter placed in his hands by the person for whose benefit it was written, and gives him credit in compliance with it, there springs from the letter and its acceptance a distinct contract, which is auxiliary to the principal contract between the person for whose benefit the letter was written and the person to whom it was addressed, which is binding upon the writer of the letter. And this writer is, upon the default of the debtor, liable to those who gave credit in accordance with its terms. *Id.*

4. CASE IN JUDGMENT.—In 1877 John Mel & Sons, being engaged in a general commission business in the city of San Francisco, having a branch house in the city of Bordeaux, France, and doing their banking business with the plaintiffs, obtained from the defendants, then doing business under the name and style of Falkner, Bell, & Co., a letter of credit, as follows: "San Francisco, Sept. 20, 1877. The Merchants' Banking Company of London (Limited), 112 Cannon street, London—Dear Sirs: At the request of Messrs. John Mel & Sons of this city, we hereby authorize Messrs. A. Lafargue & Co. of Bordeaux to draw on you at sixty days' sight for our account, to the amount of three thousand pounds sterling (£3,000). All drafts must be drawn at Bordeaux, and be accompanied by due advice. This credit to be in force for twelve months from October 31, 1877, to October 31, 1878. We are, dear sir, yours faithfully, Falkner, Bell, & Co." *Held*, that the proposition fairly deducible from the language of such letter was a promise on the part of the defendants to guarantee the credit of Mel & Sons for twelve months, from October 31, 1877, until October 31, 1878, to the amount of three thousand pounds sterling, and for that to authorize Lafargue & Co. at Bordeaux, to draw on the Merchants' Bank of London (Limited) for their account, by sixty days' sight draft or drafts, the same to be drawn at Bordeaux; that upon the acceptance of such proposition by Lafargue & Co. a contract was created between them and the writers; and that, upon the dishonor of drafts drawn by them on the Merchants' Bank of London, in conformity with such letter of credit, the defendants were liable. *Id.*

LIEN.

1. FORECLOSURE OF ASSESSMENT LIEN—EXTINGUISHMENT OF PRIOR LIEN.—Judgment affirmed for the reasons given in the opinion of the department, reported in 5 West Coast Rep., 234. *Wood* v. *Bradley et al.* *Cal.*, 242.

See ATTACHMENT, 7.

LOCATION.

See MINES AND MINING, 1, 12, 18.

MALICE.

See ASSAULT, 2; MALICIOUS PROSECUTION, 1; MURDER AND MANSLAUGHTER, 2, 4.

MALICIOUS PROSECUTION.

1. MALICIOUS PROSECUTION OF CIVIL ACTION—MALICE ESSENTIAL.—In an action to recover damages for the malicious prosecution of a civil action, the existence of malice is essential to a recovery, consequently it is error to refuse to instruct the jury "that if the defendants instituted suit against plaintiffs in good faith, without malice and with no other motive than to recover a debt which they honestly believed were due by plaintiffs, then plaintiffs cannot recover." *Gonzales* v. *Cobliner.* *Cal.*, 329.

MANDAMUS.

1. WHEN LIES—WHAT PETITION MUST SHOW.—To authorize the issuance of a writ of *mandamus* the petitioner must show a legal right to have the act done which is sought by the writ; that such act is the plain, legal duty of the respondent to perform, without discretion on his part, either to do or to refuse; and that the writ will be availing as a remedy, and that the petitioner has no other plain, speedy, and adequate remedy. *Daniels* v. *Miller*. *Col.*, 594.

See APPEAL, 16; TAXATION, 10.

MANSLAUGHTER.

See MURDER AND MANSLAUGHTER.

MAPS.

See DEDICATION, 1; EVIDENCE, 1

MARRIED WOMEN.

1. DEED—ESTOPPEL TO DENY SUFFICIENCY OF ACKNOWLEDGMENT.—The plaintiff, ever since 1855, had been a married woman, her husband being a resident of England. The plaintiff, in 1863, formed a meretricious union with the defendant, and they lived together, in California, as husband and wife, down to the year 1873. The deeds in question were executed by her, one in 1873 and the other in 1878. They were acknowledged by her as a *feme sole*, but not in the form prescribed by statute for the acknowledgment of a married woman. *Held*, that the plaintiff, by her conduct had estopped herself from invoking such statute for the purpose of defeating her deeds. *Hand* v. *Hand*. *Cal.*, 344.

MARSH LANDS.

1. GRANT OF MARSH LANDS BY MEXICAN GOVERNMENT.—The want of power in the Mexican government to grant marsh lands lying between the high and ordinary high tide: *Held*, not to have been satisfactorily shown. *Oakland Gas Light Co.* v. *Dameron*. *Cal.*, 154.

MASTER AND SERVANT.

See NEGLIGENCE, 1, 2, 9.

MECHANIC'S LIEN.

1. FORECLOSURE OF MECHANICS' LIENS—JOINDER OF ACTION—DENIAL OF SEPARATE TRIAL.—In an action, under section 1193 of the code of civil procedure, by two lienors, to foreclose their liens, the refusal of the court to allow the defendant separate trials of the respective claims of the plaintiffs, is not prejudicial error, if, after demanding such trials, the defendant withdrew his answer as to one of the plaintiffs. *Curnow et al.* v. *Happy Valley Blue Gravel etc. Mining Co.* *Cal.*, 535.

2. PARTY NOT ENTITLED TO JURY TRIAL—EQUITABLE ACTION.—An action to foreclose a mechanic's lien is a proceeding in equity, in which a party is not entitled as of right to a jury trial. Consequently granting or refusing a demand for a jury trial in such case is entirely within the discretion of the court. *Id.*

3. DENIAL OF WORK MUST BE POSITIVE.—In such action, where the answer admits ownership of the property, and the employment of the plaintiff to perform labor upon it, by the defendants' superintendent, a denial that plaintiff performed such labor must be positive; a mere denial, upon information and belief, does not raise any issue. *Id.*

4. DESCRIPTION OF PROPERTY IN LIEN.—A description of the property upon which liens were created, as "that certain mining property and real estate situated in Mokelumne Hill mining district, in said county, in sections 8, 18, and 17 of township 5 north, range 12 east, Mount Diablo base and meridian, and known as the Happy Valley Blue Gravel and Hydraulic mining claim, commencing in said section 7, in Happy Valley, at and including the placer mining claim formerly owned by Patrick Drumm, and running southerly down and along the gravel channel into said section 18, into the Sport Hill diggings, to and including the placer mining claim formerly owned by Harry Percival, together with a tunnel commenced in said section 17 by said defendant, on the Calaveras-river side of the ridge east of said mining ground,

and running westerly and towards the southern end of said mining ground, for the purpose of tapping the same and working the same through said tunnel as a hydraulic mining claim; and that said tunnel is a part of said defendant's said mining claim." This description is sufficient for identification. *Id.*

5. DENIAL OF LEGAL CONCLUSION.—In such action a denial that the plaintiff has "at all complied with the requirements of the provisions of chapter 2, title 4, part 3, of the code of civil procedure of the state of California, relating to mechanics' and laborers' liens, or that he is entitled to any lien on any property of defendant," is but a conclusion of law. *Id.*
6. FORECLOSURE—PLEADING—BURDEN OF PROOF.—In an action to foreclose a mechanic's lien, a denial in the answer of an allegation in the complaint that the interests or claims of the defendants were subordinate and subject to the lien of the plaintiff does not cast on him the burden of proving that allegation. If the defendants had stated facts showing that their claim was not subordinate or subject to the lien of the plaintiff they would have had the affirmative of the issue. It was their business when thus called upon to disclose the nature of their claims. By not doing so they can occupy no better position than they would if they had done so. *Harmon et al.* v. *Ashmead et al.* *Cal.*, 682.
7. DEFENDANT, WHEN HAS AFFIRMATIVE.—Conceding that such denial raised an issue, it was one of which the defendants had the affirmative, and if they introduce no evidence to support it the court is justified in finding that their claim was subordinate and subject to the plaintiff's. *Id.*
8. STATEMENT IN LIEN—COMPLETION OF BUILDING.—It is unnecessary to state in a lien that a building, in the construction of which materials have been furnished and labor performed, has been completed. *Id.*
9. MUST BE FILED AFTER COMPLETION OF BUILDING.—Under section 1187 of the code of civil procedure, a subcontractor, who has furnished materials used in building a house, cannot acquire a mechanic's lien thereon if the same be filed prior to the completion of the building. *Perry et al.* v. *Brainard et al.* *Cal.*, 429.
10. ACTION TO FORECLOSE—FINAL DECREE.—In an action to foreclose a mechanic's lien, the court gave judgment for the complainants, and decreed that the property affected by the lien be sold and the proceeds applied to the payment of the complainant's demand, and the balance paid into court. Subsequently, the court ordered that the decree be modified by requiring the entire proceeds to be paid into court to await the determination of the rights of priority of other lienors, and that such decree be vacated so far as it conflicted with such order. *Held*, that such prior decree was final, and that the supplemental order did not affect its finality. *Texas, Santa Fé, and Northern Railroad Co.* v. *Orman et al.* *N. M.*, 738.

MERGER.

See MORTGAGE, 5, 6; PUBLIC OFFICERS, 4.

MINES AND MINING.

1. MINING CLAIMS—LOCATION—CONTEST TO DETERMINE RIGHT OF POSSESSION—DISMISSAL OF—CERTIFICATE OF ENTRY.—Pending an action to determine the right of possession to a mining claim, brought under section 2326 of the United States revised statutes, the land department of the government has no jurisdiction to determine the matters at issue between the parties. Consequently, a certificate of entry issued to one of such parties, during the pendency of such action, is not conclusive as to the right of possession. And this, although such certificate was issued after the action had been improperly dismissed, if it be subsequently reinstated on the docket. *McEvoy et al.* v. *Hyman.* (*U. S. Cir. Ct.*) *Col.*, 309.
2. MINING CLAIM—LOCATION—RIGHT OF POSSESSION.—The right to the possession of a mining claim is derived only from a valid location; consequently, if there be no location there can be no possession under it. A location is not made by taking possession alone, but by marking on the ground, recording, and doing whatever else is required for that purpose by the acts of congress and the local laws and regulations. *Garfield M. & M. Co.* v. *Hammer et al.* *Mont.*, 2.
3. THE SAME—PLAINTIFF MUST PROVE VALID LOCATION—FORFEITURE.—In an action to quiet title to a mining claim, where the plaintiff's ownership and right to the possession are put in issue by the answer, it devolves upon him to show affirmatively upon the trial that he had complied fully with all the requirements of the act of congress, and the local rules and regulations relative to the location of mining claims,

and had made a valid location. An instruction, however, to the contrary, is not a prejudicial error, if the defendant did not introduce any evidence tending to invalidate the plaintiff's location, and relied simply upon an alleged forfeiture. *Id.*

4. THE SAME—LOCATORS PRESUMED TO BE CITIZENS.—In the absence of evidence to the contrary, the locators of a mining claim will be presumed to be citizens of the United States, or to have declared their intention to become such. *Id.*
5. THE SAME—DESCRIPTION OF CLAIM IN NOTICE.—A notice of location of a mining claim which describes it by metes and bounds, and as being a certain number of feet south from a well-known quartz location, sufficiently complies with the requirements of the act of congress, as to the description. *Id.*
6. MINING LOCATION—DISCOVERY CUT WITHIN LIMITS OF PRIOR LOCATION.—The fact that a mining location was founded upon a discovery and work done within the limits of a previously located claim will not vitiate the subsequent location, if the locators of such claim consented thereto, and moved their boundary stakes so as to exclude from their claim the ground where the discovery cut of the subsequent location was made. *McEvoy et al.* v. *Hyman.* (*U. S. Cir. Ct.*) *Col.*, 404.
7. THE SAME—BOUNDARIES—STAKES—WEIGHT OF EVIDENCE.—Where the evidence as to whether the boundaries of a mining claim were marked by stakes is conflicting, affirmative testimony of persons, to the effect that they put such stakes in position, and afterwards saw them in place, is entitled to more weight than the negative testimony of those who say that such stakes could not be found. *Id.*
8. THE SAME—MONUMENTS FOLLOWED IN PREFERENCE TO COURSES AND DISTANCES.—In identifying a location, monuments are to be followed in preference to courses and distances when the latter do not agree with the former; and the discovery cut is to be recognized as a monument, so far at least as to include it within the claim. *Id.*
9. THE SAME—DEFECTIVE CERTIFICATE MAY BE AMENDED—A certificate of location, defective in that it contains no reference to natural objects or permanent monuments, may be amended, under section 25 of the general statutes, page 724; the amendment relates to and takes effect from the date of the original certificate. *Id.*
10. MINING CLAIM—LOCATION—ANNUAL WORK—EXTENSION OF TIME FOR DOING.—Appellee located the claim in controversy on June 7, 1878. On August 7, 1878, he ceased work on the property, and did none during 1879. On June 16, 1880, appellants relocated the premises. Thereafter, in September, 1880, appellee re-entered and performed one hundred dollars' worth of work. *Held*, that the appellee had not abandoned the claim; that under the act of congress of January, 1880, amending section 2324 of the United States revised statutes, the time in which he could perform the annual labor was extended to December 31, 1880. *Hall et al.* v. *Hale.* *Col.*, 242.
11. WHETHER MINING LOCATION HAD BEEN ABANDONED OR FORFEITED, prior to an attempted subsequent location, is a question for the jury. *Taylor* v. *Middleton.* *Cal.*, 150.
12. MINING CLAIM—BOUNDARIES, HOW MARKED—LOCATION.—Whether certain monuments and stakes are a sufficient marking of the location of a mining claim depends on the condition of the ground to be located. If the conformation of the ground is such that the monument and stakes would so mark the boundaries that they could be readily traced, they are sufficient; otherwise, not. That is a question for the jury. *Id.*
13. ABANDONMENT, of a mining claim, is a voluntary act, on the part of the owner, and when relied on, as a defense, must be proved by the party alleging it. *Zakin* v. *S. B. G. M. Co.* (*U. S. Cir. Ct.*) *Cal.*, 50.
14. FORFEITURE.—A party who has forfeited a mining claim by failing to work it as required by law, may continue his right by resuming work, at any time, before any other party has re-located on the ground of forfeiture. *Id.*
15. PATENT SURREPTITIOUSLY OBTAINED.—T. and McG., being owners of a mining claim, had a survey made, applied for a patent, published the notice as required by the statute, and no adverse claim having been filed, their right to a patent became perfected. Afterwards the M. Co. claiming, without right, to be successor in interest to T. and McG., surreptitiously, procured a patent to itself on the application of T. and McG. *Held*, that the M. Co. held the title so obtained, charged with a constructive trust in favor of T. and McG., and that it did not lie in the mouth of the M. Co. to say, that T. and McG., have lost their right to the claim by forfeiture, or otherwise. *Id.*
16. ACTION TO DETERMINE RIGHT OF POSSESSION TO MINING CLAIM—CITIZENSHIP MUST BE AVERRED.—In an action, brought under section 2326 of the United States revised statutes, to determine the question of the right of possession to a mining claim, pre-

liminary to the right to purchase from the United States, the complaint must show that the plaintiffs possess those qualifications without which they would not be entitled to purchase. Consequently, the complaint must allege that the plaintiffs are citizens of the United States, or have declared their intention to become such. *Lee Doon et al.* v. *Tesh et al.* *Cal.*, 201.

17. ALIENS CAN ACQUIRE NO RIGHTS AS LOCATORS OF MINING CLAIM.—Neither prior nor subsequent to the act of July 26, 1866, could parties who were not citizens of the United States, or who had not declared their intention to become such, acquire any vested right to the possession of a mining claim on the public lands. Consequently, such parties had no rights to be preserved by the act of May 10, 1872. *Id.*

18. MINING LOCATION—RIGHTS OF PRIORITY—CROSS VEINS.—Under sections 2322 and 2336 of the United States revised statutes, when a junior mining location crosses a senior location, and the veins thereof are "cross veins," the junior locator is entitled to all the ore found on his vein, within the side lines of the senior location, except at the space of intersection of the two veins. In such case the junior locator has a right of way for the purpose of excavating and taking away the mineral contained in the cross vein. *Branagan et al.* v. *Dulaney.* *Col.*, 355.

MINORS.

See GUARDIAN AND WARD; INFANTS.

MISTAKE.

1. POSSESSION OF LAND UNDER MISTAKE—DIVISION LINE.—Possession of land, by coterminous proprietors, under a mutual mistake as to the division line, has no effect upon their legal rights; it is not adverse or conclusive against the assertion of any existing rights upon the true title. *Smith* v. *Roberts.* *Cal.*, 503.

MODEL.

See EVIDENCE, 1.

MORTGAGE.

1. DEED GIVEN TO SECURE A DEBT IS A MORTGAGE—FORECLOSURE.—A deed executed to secure the payment to the grantee of money advanced by him in payment of a note of the grantor is, in effect, a mortgage, and must be foreclosed in accordance with section 726 of the code of civil procedure. *Combs* v. *Hawes et al.* *Cal.*, 148.

2. THE SAME—GRANTEE HAS LIEN TO EXTENT OF PRIOR MORTGAGES PAID BY HIM.—If, while the legal title so stood apparently in the grantee, he was obliged to protect his security by paying off other mortgages on the land, equity would give him a lien thereon to the extent of such payments. *Id.*

3. MORTGAGE OF VENDEE'S INTEREST UNDER CONTRACT OF SALE—FORECLOSURE.—Defendants F. and B. contracted to sell the land in controversy to one L., who subsequently assigned his contract to the defendant H. H. then executed a mortgage to one McC., who assigned it to plaintiff. Subsequently F. and B. conveyed the land by deed to H., taking at the time from him his promissory note for the purchase-price, and a few days afterwards H. executed to them a mortgage on the land to secure the payment of the note. Shortly after, H. reconveyed the land by deed to F. and B. in consideration of the cancellation of the note and mortgage given by him for the purchase-price: *Held*, that the proceeds of the sale of the property, in an action brought to foreclose plaintiffs' mortgage, should be applied first to the payment of the balance of the purchase-money of the land, and next to the payment of the amount due upon the plaintiffs' mortgage. *Hawkins et al.* v. *Harlan et al.* *Cal.*, 498.

4. ASSIGNMENT OF MORTGAGE NEED NOT BE RECORDED—NOTICE.—An assignment of a mortgage, whether the same be in the form of a conveyance, a simple writing, or a transfer of the debt secured, is not required, by the registry act, to be recorded, in order to impart notice to or to protect the assignee against subsequent incumbrances and purchasers. *Watson* v. *Dundee Mortgage and Trust Company et al.* *Or.*, 361.

5. FORECLOSURE OF MORTGAGE—RIGHTS OF PURCHASER—LIEN OF PRIOR MORTGAGE WHEN SURVIVES—MERGER.—A purchaser at a foreclosure sale, under a prior mortgage, acquires the right of the mortgagee, so far as he has any claim or interest in the mortgaged premises for the security of his debt, and also so much of the equity

of redemption as is not bound by the lien of a junior mortgage. And a conveyance by such purchaser will not merge the lien of the prior mortgage in the fee so as to give a junior mortgagee, who was not a party to the foreclosure suit, priority over the rights of the grantee, and those claiming under him, whether as purchasers or incumbrancers. *Id.*

6. MERGER—EQUITABLE PRINCIPLES GOVERNING.—When a greater and less estate unite in the same person, equity will not consider them as merged, unless it is perfectly indifferent to the party in whom they are united, whether the charge or term should or should not subsist. If the owner has an interest in keeping them distinct, or there is an intervening right, there will be no merger. *Id.*
7. MORTGAGE TO MANAGER OF CORPORATION—ASSIGNMENT—NOTICE.—Where a subsequent mortgage is taken in the name of the manager of a corporation, for and on behalf of the latter, and afterwards assigned to it, and a suit to foreclose a prior mortgage is brought, in which such manager is made a party defendant, and served, the notice to him of such suit is notice to the corporation. *Id.*
8. MORTGAGE—AGREEMENT FOR RENEWAL OF.—After the maturity of a note and mortgage, the mortgagor executed to the mortgagee an instrument in which, after reciting the loan and the execution of the note and mortgage, and the place of record of the latter, and that he was desirous of extending the loan, it was agreed "that the time for the payment of the said promissory note shall be extended to, and the said note shall not mature or be payable until the thirtieth day of December, 1874, provided that this agreement shall not affect or impair any other covenant or condition in the said promissory note or mortgage contained, but that they shall remain in as full force and effect as if this agreement had not been made:" *Held*, that this agreement was a renewal of the note and mortgage, within section 2922, civil code. *German Savings and Loan Society* v. *Hutchinson, Executrix, etc., et al.* *Cal.*, 206.
9. ESTATE OF DECEDENT—PRESENTATION OF CLAIM—STATUTE OF LIMITATIONS.—Under section 1569 of the code of civil procedure, the statute of limitations does not run against a claim, founded on a note and mortgage, after the same has been presented to and allowed by the executor of the deceased mortgagor. *Id.*
10. THE SAME—PAYMENTS FOR TAXES AND ASSESSMENTS—ATTORNEY'S FEES.—Payments made for taxes and street assessments, under authority given in the mortgage, after the presentation of the claim, are properly allowable on foreclosure without presentation. And the same is true of an attorney's fee provided for in the mortgage. *Id.*

See ATTACHMENT, 6, 7; CORPORATIONS, 3; PRINCIPAL AND AGENT, 4.

MUNICIPAL CORPORATIONS.

1. MUNICIPAL CORPORATIONS—DAMAGE TO PRIVATE PROPERTY—IMPROVING STREETS. A constitutional provision that "private property shall not be taken or damaged for public use without just compensation," will not give an abutting owner a right to recover from a municipal corporation for injuries caused by a reasonable change or improvement of the street, by the proper authorities, in a careful manner. *City of Denver* v. *Vernia.* *Col.*, 249.
2. THE SAME—OFFICIAL GRADE—ESTABLISHED BY ORDINANCE.—Where the grade of a street has been fixed by ordinance, one who purchases abutting property is not warranted in relying upon the outward appearance of the street in determing the grade; it is his duty to inquire of the proper city officers. *Id.*
3. THE SAME—REDUCING STREET TO OFFICIAL GRADE.—Where the official grade of a street and an adjoining sidewalk are the same, they should each be reduced to the established level at the same time. A failure so to do will render the city liable for injuries resulting to an abutting land-owner. *Id.*
4. LAUNDRY ORDINANCES, VALIDITY OF—REGULATION OF USE OF WOODEN BUILDINGS. Under section 2 of article 11 of the constitution, and section 74 of the act of April 19, 1856, usually known as the consolidation act, the board of supervisors of the city and county of San Francisco has authority to prohibit or regulate all occupations which are against good morals, contrary to public order and decency, or dangerous to the public safety. In the exercise of such power they have the right to establish fire limits, and to interdict the construction of wooden buildings within certain specified bounds, and also to regulate the use of such buildings. Consequently, order No. 1569 and section 68 of order No. 1587 of such board, which interdicts the establishing, maintaining, or carrying on of laundries, except by consent of the board of supervisors, save in brick or stone buildings, is a valid exercise of such power. Such orders have not been repealed by the subsequent order of the board, No. 1767, regu-

lating the establishment and maintenance of public laundries and wash-houses within certain limits. *In re Yick Wo, on Habeas Corpus. Cal.*, 548.

5. RULES FOR THE CONSTRUCTION OF ORDINANCES AND ORDERS of a municipal corporation are the same as for statutes of the legislature. *Id.*

See CONSTITUTIONAL LAW, 5, 9; DEBTOR AND CREDITOR, 2.

MURDER AND MANSLAUGHTER.

1. MURDER—INDICTMENT—SURPLUSAGE ALLEGATIONS.—An indictment for murder charged the defendant with having killed the deceased "purposely and of deliberate and premeditated malice," by "unlawfully and feloniously shooting him," etc.: *Held*, that the crime of murder was sufficiently alleged; that the words "unlawfully and feloniously" referred solely to the shooting, and did not affect the preceding allegation as to the intent with which the killing was done; and that such words were surplusage, and might be disregarded. *State* v. *Abrams. Or.*, 509.

2. MURDER—MALICE—DELIBERATION AND PREMEDITATION.—When a killing of a human being is shown to be without extenuating circumstances, malice is presumed; when malice is thus shown, if the evidence clearly discloses deliberation or premeditation in the act of killing, or the existence of an intention to kill while giving the fatal blow, such killing is murder in the first and not in the second degree. *People* v. *Hamblin. Cal.*, 308.

3. MURDER—KILLING DURING COMBAT—JUSTIFICATION AND MITIGATION.—The mere fact that the deceased and the defendant were in actual combat at the time of the homicide does not, of itself, mitigate the homicide or justify or excuse it. Justification or excuse for taking human life must arise out of the circumstances in which the killing took place, as proved by the testimony on the part of the prosecution or of the defendant. If the circumstances show that a person, armed with a deadly weapon, on being assaulted, takes advantage of the assault made upon him to kill his assailant, and does, in execution of his purpose, kill him, not in the heat of passion caused by the assault, nor in reasonable defense of himself against the assault, it is murder. *People* v. *Robertson. Cal.*, 159.

4. EXISTENCE OF MALICE MAY BE INFORMED FROM FACTS FOLLOWING THE ASSAULT.—If the circumstances of a combat following an assault show that from the outset the words and acts of the defendant indicated an intention to kill, or to take his assailant at an unfair advantage to kill him under the color of the assault, it is murder. The sufficiency of such circumstances, as evidence to prove the existence of malice, is a matter for the consideration of the jury. *Id.*

5. SELF-DEFENSE—ENDEAVOR TO DECLINE FURTHER COMBAT—CASE IN JUDGMENT.—The defendant went into the store of the deceased, and upon the latter's refusal to sell to him on credit, commenced to abuse the deceased with opprobrious and threatening language. The deceased then picked up an iron-hooked stick, and with the end of it "poked and punched" the defendant, who fell on the porch of the store. The defendant got up and, instead of going away, turned upon the deceased, and seized hold of the stick; in the struggle over it the defendant stabbed the deceased, killing him almost instantly. *Held*, that such killing was not in self-defense; that, in order to constitute a justification, under such circumstances, the defendant should have really and in good faith endeavored to decline any further struggle before taking the life of his assailant. *Id.*

6. PAUSE IN COMBAT—RENEWAL OF ASSAULT.—It appeared that when the defendant fell upon the porch the deceased did not continue the assault upon him: *Held*, that such fact constituted a sufficient pause in the combat, upon which to base an instruction as to the effect, on the defense of justification, of a renewal of the affray by the defendant. *Id.*

7. MURDER COMMITTED DURING PERPETRATION OF ROBBERY.—The killing of a human being, although unintentional, when perpetrated by a person engaged in the commission of robbery, is murder in the first degree, under sections 2323 and 2327 of the compiled laws. And the court may instruct the jury that if they find the murder was so committed, they must find the defendant guilty of murder in the first degree. *State* v. *Gray. Nev.*, 72.

8. ABANDONMENT OF FELONIOUS INTENT.—On the trial the defendant testified "that on the night of the homicide he entered the store of S. & P., with the intention of committing robbery by intimidation; that he carried a shot-gun with both barrels loaded, but uncocked, that he requested deceased to keep still, but that when he saw the movements of S. he abandoned all intention of committing any robbery or other

felony, and was endeavoring in good faith to leave the premises without committing any felony whatever; that in so doing the gun was jerked from him, and accidentally discharged; thereby deceased was killed and defendant fled; that immediately before the gun was seized by deceased, defendant cried out, 'Hold on, and I will go:'" *Held*, not to show an abandonment by defendant of his felonious attempt. *Id.*

9. MURDER AND MANSLAUGHTER—ACCIDENTAL HOMICIDE.—Whatever may be the difference as to degree of homicide, a party whose negligence causes the death of another is responsible, whether the business in which he is engaged was legal or illegal. If the business was of such a character as to be felonious, the offense is murder. But even where the business is perfectly legal, negligence, in the discharge of it, when producing homicide, is manslaughter. To this general rule there are exceptions, as where an act, careless in itself, is committed, with fatal results, under circumstances or at a place from which it might be inferred that no injury could happen from the carelessness of the party acting. *State* v. *Ju tus. Or.*, 515.

10. MURDER—VERDICT—DUTY OF JURY AS TO FINDING ON PUNISHMENT.—If the jury find the defendant guilty of murder in the first degree, and they also find that there is some extenuating fact or circumstance in the case, it is within their discretion to pronounce such a sentence as will relieve the defendant from the extreme penalty of the law. But the discretion is not an arbitrary one, and is limited to determining which of two punishments shall be inflicted, and is to be employed only when the jury is satisfied that the lighter penalty should be imposed. If the evidence shows the defendant to be guilty of murder in the first degree, but does not show some extenuating fact or circumstance, it is the duty of the jury to find a simple verdict of murder in the first degree and leave with the law the responsibility of affixing the punishment. *People* v. *Brick. Cal.*, 427.

11. MURDER—INSTRUCTIONS—RECOMMENDATION FOR MERCY.—In a prosecution for murder, the jury, after deliberating for a considerable length of time, came into court and asked whether they could "indorse on the verdict a recommendation for mercy." The court answered in the affirmative, and thereupon a verdict of guilty was returned, with such recommendation indorsed. *Held*, that such instruction was error, as it must be presumed that the verdict would not have been agreed upon, except under the belief that the court had the power to mitigrate the sentence. *Hackett* v. *People. Col.*, 274.

12. THE EVIDENCE REVIEWED AND HELD TO SHOW THAT MANSLAUGHTER was the highest grade of crime for which a conviction could be sustained. *Id.*

13. MURDER—CIRCUMSTANTIAL EVIDENCE—WHEN JURY SHOULD ACQUIT.—In a prosecution for murder, where the evidence of the defendant's guilt is entirely circumstantial, the jury should acquit if there is any other reasonable theory or hypothesis upon which the killing may be accounted for. An unreasonable or imaginary hypothesis, though it be supposed to arise from the evidence, will not justify a verdict of not guilty. *Minich* v. *People. Col.*, 580.

14. EVIDENCE REVIEWED, AND ALTHOUGH CIRCUMSTANTIAL, held to sustain the verdict of conviction. *Id.*

15. PROSECUTION NEED NOT CALL ALL PERSONS PRESENT AT KILLING.—The denial of a motion made by the defendant, after the prosecution rested, to order the prosecution to call and examine, as witnesses in the case, certain persons who were said to have been present at the time of the homicide, is not error. *People* v. *Robertson. Cal.*, 159.

16. CRIMINAL LAW—MURDER—ONCE IN JEOPARDY—VOID CONVICTION.—A conviction for murder, under an information that charged the commission of the offense on a day subsequent to the date of its filing, would be a nullity, and a plea of once in jeopardy founded thereon cannot be sustained. *People* v. *Larsen. Cal.*, 166.

17. MURDER—REPEAL OF LAW PRESCRIBING PUNISHMENT.—Where the law authorizing and prescribing the punishment for murder is repealed, without a saving clause, after a murder has been committed, a conviction therefor cannot be had under a law subsequently enacted. *Packer* v. *People. Col.*, 243.

18. THE SAME—CONCLUSION OF INDICTMENT.—An indictment for murder, which concludes that the killing was done "against the peace and dignity of the people of the state of Colorado," will not be quashed although it is shown by the indictment that the crime was committed when Colorado was a territory. *Id.*

19. THE SAME—MANSLAUGHTER INCLUDED IN MURDER.—Manslaughter is an included offense in the crime and charge of murder, and is sufficiently charged and covered by a good indictment for murder. *Id.*

20. THE SAME—VOID CONVICTION—ONCE IN JEOPARDY.—If a defendant is convicted of murder, in a proceeding wherein the court was without jurisdiction to try him for

that crime, he has not been once in jeopardy, and may subsequently be tried for manslaughter. *Id.*

21. A REPEAL OF LAWS PRESCRIBING THE PUNISHMENT FOR MURDER is not a repeal of laws affecting the crime of manslaughter. *Id.*
22. MURDER—EVIDENCE—DECLARATIONS OF DECEASED—ADMISSION OF, WHEN NOT ERROR.—In a prosecution for murder, the admission of declarations of the deceased made after receiving the injury, although not properly dying declarations or part of the *res gestæ*, will not warrant a reversal if not calculated to prejudice the defendant. *People* v. *Sullivan*. *Cal.*, 156.

See ASSAULT, 2; VENUE.

NAVIGABLE STREAM.

See INJUNCTION, 6.

NEW TRIAL.

1. NEWLY DISCOVERED EVIDENCE.—A new trial will not be granted on the ground of newly discovered evidence, if it was within the power of the moving party to have procured such evidence on the trial. *People* v. *Jones*. *Cal.*, 200.
2. CUMULATIVE EVIDENCE.—A new trial will not be granted on the ground of newly discovered evidence, if the same be merely cumulative. *Garfield M. & M. Co.* v. *Hammer*. *Mont.*, 20.
3. GROSS MISCONDUCT OF DISTRICT ATTORNEY—CHARGING DEFENDANT WITH OTHER OFFENSES.—Gross misconduct of the district attorney, in charging the defendant, in his closing argument to the jury, with having been guilty of several murders, of which no evidence had been given, will be deemed prejudicial, and warrant a new trial. And this, although prior to the commencement of such argument the court cautioned the jury not to consider statements of counsel not supported by the evidence. *Smith* v. *People*. *Col.*, 577.
4. SEPARATION OF JURY—NEW TRIAL.—A separation of the jury during the trial of such case will not warrant a new trial, unless it appears that the defendant was injured thereby. *State* v. *Gray*. *Nev.*, 72.
5. NOTICE OF MOTION FOR NEW TRIAL NO PART OF JUDGMENT ROLL OR RECORD ON APPEAL.—The notice of intention to move for a new trial constitutes no part of the judgment roll or of the record to be furnished to the supreme court on appeal from an order granting or denying a new trial. *Hook* v. *Hall*. *Cal.*, 153.
6. PRESUMPTION IN FAVOR OF ACTION OF LOWER COURT.—In support of the action of the lower court in granting a new trial, in an action tried by a jury, it will be presumed that the motion was made on the ground (amongst others) that the verdict was not justified by the evidence; and if the evidence be substantially conflicting, the order will be affirmed. *Id.*
7. TIME OF FILING NOTICE—RECITAL IN STATEMENT OF CASE.—The fact that a notice of motion for a new trial was not filed within the time required by the code of civil procedure will not be inferred, on appeal, from a recital contained in the statement of the case, immediately preceding the judge's certificate of settlement, to the effect that the adverse party reserves the right to object to the hearing of the motion on the ground that the notice of motion was not filed in time. Such recital cannot be treated as in the nature of a bill of exceptions. *Id.*
8. NOTICE OF INTENTION—TIME FOR FILING—WAIVER.—An objection that a notice of intention to move for a new trial was not served and filed in time is waived if there is nothing in the statement to show that the adverse party made any objection to the service of the notice on admitting service of it, or of the statement, or on settlement of the statement. *Schiefferly* v. *Tapia*. *Cal.*, 419.
9. MOTION FOR—WAIVER OF IRREGULARITIES.—Where a motion for a new trial is made upon a prepared statement, to which amendments are prepared and settled, and certified according to law, without any objection taken, or right reserved to object thereafter, to any irregularities in the proceedings leading up to, or in connection with, the settled statements, and the motion is heard and decided upon the statement without any objection, any irregularities in the proceeding upon the motion is waived, and cannot be availed of in the supreme court for the first time. Such statement, in connection with the judgment roll, is the record on appeal from the order denying the motion. *Hibernia Savings and Loan Society* v. *Moore et al.* *Cal.*, 317.

10. AMENDMENT OF NOTICE OF INTENTION.—Whether the trial court has power to amend a clerical error in a notice of intention to move for a new trial, not decided. *Guardian Fire and Life Assurance Co.* v. *Thompson et al.* *Cal.*, 463.

11. STATEMENT ON—CONSIDERATION OF, ON APPEAL.—When a statement on motion for a new trial is certified by the judge of the court in the manner provided by law, and filed with the clerk, it becomes part of the record. And where the notice of motion for a new trial specifies that the motion would be based on "a statement of the case," such statement, prepared, settled, and filed, will be presumed to have been used on the hearing of the motion; and coming to the supreme court as a part of the record on appeal, under section 661 of the code of civil procedure, duly certified by the clerk, will be considered without further identification or proof that it was used on the motion for new trial. *Williams* v. *Southern Pacific Railroad Company.* *Cal.*, 542.

12. ORDER ON BEFORE SETTLEMENT OF STATEMENT IRREGULAR—AFTER APPEAL ORDER CANNOT BE SET ASIDE.—An order denying a motion for a new trial is irregular if made and entered before the statement on the motion, to which amendmets had been proposed, is settled and certified by the court. An order so made cannot be set aside by the lower court after an appeal has been taken therefrom to the supreme court. *Stewart* v. *Taylor.* *Cal.*, 167.

13. AFFIDAVITS USED ON MUST BE IDENTIFIED.—Affidavits used on a motion for a new trial will not be considered on appeal, unless the same are indorsed by the judge or clerk at the time, as having been read or referred to on the hearing of the motion. *Albion Con. Mg. Co.* v. *Richmond Mg. Co.* *Nev.*, 100.

14. EVIDENCE REVIEWED.—The evidence as to the value of the ore removed by the appellant from the respondent's mine reviewed at length, and held that the verdict of the jury was not sustained thereby, and that a new trial was properly ordered. *Id.*

15. VERDICT—CONFLICT OF EVIDENCE.—An order granting a new trial, on the ground that the evidence was insufficient to sustain the verdict, will not be reversed on appeal, when the evidence is conflicting. *Mullins* v. *Wieland.* *Cal.*, 485.

See APPEAL, 1; CRIMINAL LAW, 7; EVIDENCE, 15.

NEGLIGENCE.

1. EMPLOYER AND EMPLOYEE—COMMON BUSINESS—PLEADINGS.—In a complaint to recover for the negligent death of an employee, when the acts and omissions, constituting the negligence, are alleged to have been done or omitted by the defendant itself, as employer, the court cannot presume that they were those of a fellow-employee of the deceased. Consequently the question of the responsibility of a common employer for negligence of another person employed in the same general business cannot arise on demurrer to the complaint. *Brown, Administratrix, etc.*, v. *Central Pacific R. R. Co.* *Cal.*, 392.

2. MASTER AND SERVANT—FOREMAN NOT A FELLOW-SERVANT.—A foreman, to whom a stevedore commits the entire charge of the business of unloading a vessel, with power to choose his own assistants, and to control and discharge them as freely and fully as the principal himself could, is not a fellow-servant with those employed under him; and if, in the performance of the work, death or injury results to a servant from the wrongful act or negligence of such foreman, the principal is liable, although he exercised due care in the selection of the foreman. In such case the rule exempting the principal from liability for injuries caused by the negligence of a fellow-servant has no application. *Brown et al.* v. *Sennet et al.* *Cal.*, 470.

3. CONTRIBUTORY—OPERATIVE AMONG MACHINERY.—It is the duty of an operative, engaged in working in the vicinity of machinery, to exercise his thinking faculties, and give careful attention to the business in which he is engaged. If he fails so to do, and is injured in consequence, he is guilty of such contributory negligence as to prevent his maintaining an action therefor. *Hurst* v. *Burnside.* *Or.*, 446.

4. CONTRIBUTORY—PROXIMATE CAUSE.—One who is injured by the mere negligence of another cannot recover compensation therefor, if, by his own ordinary negligence or willful wrong, he proximately contributed to produce the injury of which he complains; so that but for his concurring and co-operating fault the injury would not have happened to him, except where the more proximate cause of the injury is the omission of the other party, after becoming aware of the danger to which the former is exposed, to use a proper degree of care to avoid injury. *Williams* v. *S. P. R. R. Co.* *Cal.*, 542.

5. LYING DOWN ON RAILROAD TRACK.—One who, in a state of intoxication, lies down upon a railroad track, is guilty of gross negligence, and if he is injured by being run over by a passing train the company is not liable, unless, in the exercise of reasonable care after the person is discovered in his exposed position, it could not have avoided the injury. *Id.*

6. DUTY OF RAILROAD AS TO TRESPASSER ASLEEP ON TRACK.—Where a railroad company discovers a person asleep or helpless upon its track, as the presumption is that he cannot help himself, it becomes the duty of the company and its employees to use all reasonable care, by stopping its train, so as to prevent injury to one helpless to save himself from impending danger. At other places upon its road where persons have a right to be, the company is not bound, except in behalf of its own passengers, to watch for trespassers upon its track, but if at any time and at any place it discovers persons upon its road, apparently unable to protect themselves from its passing trains, it becomes its bounden duty to use all reasonable care and diligence to prevent their being injured; and, failing in this duty, it will become liable for injury to such persons, although they may have been guilty of contributory negligence, the injury being in such cases attributed to the willful or wanton act of the company, as the proximate cause, and not to the negligence of the injured party. For trespassers a railroad company is not bound to be watchful; hence no presumption of negligence arises from the absence of such care, as to such persons. As to a trespasser upon the road who is injured, being himself negligent, the evidence should show, not merely that he might have been seen, but that he was in fact seen, in time and under circumstances rendering it the duty of the company to check the progress of its train, before it can be held for an injury to such wrong-doers. *Id.*

7. CONTRIBUTORY NEGLIGENCE, WHEN QUESTION FOR COURT.—Where the question of contributory negligence is left in doubt by the evidence it should be submitted to the jury under proper instructions, but where the evidence is clear as to the facts, the question of contributory negligence is one of law for the court. *Id.*

8. INSTRUCTIONS AS TO CONTRIBUTORY NEGLIGENCE.—In an action to recover for a negligent injury, an instruction that "one party cannot recover for an injury occasioned by the negligence of another, unless he himself is without negligence contributing to the injury complained of," is not erroneous in not specifying the degree of contributory negligence which will prevent a recovery, if the instruction immediately following supplies such omission. *Id.*

9. RAILROAD—LIABILITY OF EMPLOYER—ORDINARY CARE—ACT OF GOD.—A railroad company is bound to furnish to its employees a suitable and safe road, engines, cars, and appliances for conducting its business, and to select competent and reliable servants, the nature of the business being considered. This duty performed, if from some extraordinary extrinsic cause or condition, such as an act of God, an injury results to the employee, the company is not liable. If, however, the injury results from the combined operation of the act of God, and the want of ordinary care on the part of the company, the employer is liable, under section 1971 of the civil code. But not if the company was only guilty of slight negligence. *Rodgers, Adm'x* v. *Central Pacific Railroad Co.* *Cal.*, 20.

10. STRAYED ANIMAL—DAMAGE TO, BY FALLING THROUGH RAILROAD BRIDGE.—The owner of a horse turned it loose in the evening, in the morning it was found by the servants of the appellant, upon one of the railroad bridges on its track, where the animal had broken a leg by slipping it down between the bridge timbers. The appellant's servants extricated the horse, and then killed it. The evidence showed that the horse was valueless when killed: *Held*, that the company was not liable for the damage to the horse, as it was under no duty to the owner to keep its bridge inclosed, and that the killing of the horse, after the accident, was an act of humanity. *Denver and Rio Grande R'y Co.* v. *Chandler.* *Col.*, 281.

11. CIRCUMSTANTIAL EVIDENCE—PROVINCE OF JURY—VERDICT.—In an action to recover damages for negligence, when the evidence thereof is circumstantial, it is the province of the jury to determine the facts and proper inferences from them, establishing the negligence. The verdict of the jury on such evidence should not be set aside unless when, in the judgment of reasonable men, no such deduction as that expressed in the verdict could be properly drawn from the facts in evidence. *McDermott* v. *S. F. & N. P. R. R. Co.* *Cal.*, 186.

NONSUIT.

1. NONSUIT—EVIDENCE TENDING TO SUSTAIN ISSUES OF COMPLAINT.—When the plaintiff gives evidence tending to sustain the issues presented in the complaint, a nonsuit cannot be granted. *Craven* v. *Nolan.* *Cal.*, 166.

NOTICE.

1. POSSESSION AS NOTICE OF PRIOR RIGHTS.—The open, notorious, and exclusive possession of land, under an apparent claim of ownership, is notice to subsequent purchasers, of whatever interest the one in possession has to the premises, whether such interest be legal or equitable in its nature. *Yates* v. *Hurd. Col.*, 276.

2. DUTY OF POSSESSOR TO DISCLOSE TITLE TO SUBSEQUENT PURCHASER.—But a party so in possession, under a contract for the sale of the premises, cannot, when interrogated by a would-be purchaser concerning his claim or right, either expressly misrepresent or tacitly suppress any material fact, whereby the latter is misled, without suffering the consequences. These consequences are that he is estopped from afterwards asserting the claim or equity which he ought to have disclosed, but did not, as against the title of the purchaser whom he deceived or misled. *Id.*

3. ESTOPPEL BY ELECTION—CASE IN JUDGMENT.—A grantee of land, in an action by the grantor to recover on notes given for the purchase-price, set up a partial failure of consideration, resulting from the fact that such land was in the possession of another, claiming an equitable title to the same under a prior contract of sale from such grantor. Judgment was rendered in favor of the grantor, and the grantee was compelled to pay the notes: *Held*, that the assertion of such defense did not afterwards estop the grantee from disputing the equitable title of the vendee under such contract of sale. *Id.*

See APPEAL, 3, 6, 11, 22; BONA FIDE PURCHASERS; CONSIDERATION, 5; DEEDS, 6; MORTGAGE, 4; NEW TRIAL, 5, 7, 8, 10; PRINCIPAL AND AGENT, 7.

OATH.

See JURY AND JURORS, 3, 4.

OCCUPANCY.

See EASEMENT, 3; PUBLIC LANDS, 8, 11.

ORDINANCE.

See CONSTITUTIONAL LAW, 9; MUNICIPAL CORPORATION, 2–5.

OUSTER.

See ADVERSE POSSESSION, 2.

PARTIES.

1. PROMISE IN FAVOR OF THIRD PERSON—ACTION MAY BE MAINTAINED ON.—One in whose favor a promise is made, upon a consideration moving from another, may maintain an action thereon, although he was not informed thereof until afterwards. *Schnider* v. *White. Or.*, 742.

2. ACTION TO QUIET TITLE—PARTIES—AMENDMENT.—The complaint in an action brought under section 738 of the code of civil procedure to quiet title to land is to be treated as a bill in equity. In such action, one who holds the legal title to the premises in dispute, without any beneficial interest therein, is a proper party to a final determination of the controversy, and may be brought in as a party defendant by an amendment to the complaint. *Reynolds* v. *Lincoln et al. Cal.*, 666.

3. THE SAME—MISJOINDER OF CAUSES OF ACTION—DEFENDANT SUED AS TRUSTEE. Several causes of action cannot be united in the same complaint unless they are each included within one of the several classes designated in section 427 of the code of civil procedure. Consequently a cause of action relating to the recovery of real property cannot be united with a cause of action against a defendant as a trustee, by virtue of a contract or by operation of law. The joinder of such causes of action is error prejudicial to the defendants, when the evidence given and findings made were adapted to meet the issues under the cause of action improperly joined. *Id.*

PARTITION.

1. CONCLUSIVENESS OF JUDGMENT—EFFECT OF.—A judgment in an action of partition is conclusive as to the title under which the parties to the action hold in common the land partioned between them. It does not have the legal effect of changing the title, or of vesting any new or additional title in the land allotted and set off to

each in severalty. It has only the legal effect of severing the untity of possession. *Christy* v. *Spring Valley Water Works.* *Cal.*, 228.

2. DEFENDANT MUST DISCLOSE TITLE ACQUIRED PENDENTE LITE.—If a defendant in an action of partition, after he has filed his answer, but before the rendition of any interlocutory decree, acquires by deed a new and independent title to the premises in controversy, he is bound on the trial to disclose the title so acquired; otherwise, the judgment of the court establishing the title, as it was found to exist in the tenants in common, at the date of its rendition, is conclusive upon all the parties as to whatever title or claims to the land they had *then* in the land. And in a subsequent action to recover possession of a tract awarded in severalty to a party to the action, such deed cannot be relied on to defeat the title established by the judgment in partition. *Id.*

3. CONVEYANCE PENDENTE LITE—STATUTE OF LIMITATIONS.—An action for partition of certain lands, including the land in controversy, was commenced against the defendant and others in 1860, and was determined in 1877. Pending such action the defendant W. conveyed to the plaintiffs an undivided part of the land claimed by him. The plaintiffs did not become parties to the partition proceedings. In 1878 the plaintiffs demanded of the defendant W. to be let into possession of the land allotted to him in the partition suit. This the defendant refused. *Held*, that the statute of limitations did not commence to run against the plaintiffs until such demand and refusal. *Martin et al.* v. *Walker et al.* *Cal.*, 689.

PARTNERSHIP.

1. PARTNERSHIP, HOW ESTABLISHED—AGREEMENT TO SHARE PROFITS.—An agreement between two or more parties to engage jointly in a business may constitute a partnership, although that term was not used, nor any express mention made in regard to profits or losses. If it were understood between the parties that there was to be a community of profits, it would constitute a partnership. *Bloomfield* v. *Buchanan et al.* *Or.*, 644.

2. THE EVIDENCE REVIEWED, AND HELD TO ESTABLISH A PARTNERSHIP between the plaintiff and the defendants in certain government contracts. *Id.*

3. DISSOLUTION BY ASSIGNMENT FOR BENEFIT OF CREDITORS—PROPERTY EXEMPT FROM EXECUTION.—The assignment by partners of the entire firm assets for the benefit of creditors, if valid, operates to dissolve the partnership; and property exempt from execution, subsequently delivered by the assignees to the assignors, is not partnership property, but belongs to them individually. Such transfer of the exempt property does not revive the partnership. *Wells* v. *Ellis.* *Cal.*, 499.

4. FICTITIOUS FIRM NAME—CERTIFICATE—PLEADINGS—A complaint, in an action by partners, to enforce a partnership contract, which discloses the fact that the contract was made by the partners in their fictitious name, is demurrable, unless it be alleged that the plaintiffs have filed the certificate of partnership required by sections 2466 and 2467 of the civil code. If such fact be alleged, the plaintiffs must prove it, in order to establish their case. *Sweeney et al.* v. *Stanford.* *Cal.*, 37.

5. FAILURE TO FILE CERTIFICATE—ABATEMENT OF ACTION.—Where the complaint fails to disclose that the plaintiffs fall within the provisions of section 2466 of the civil code, to avail the defendant, the failure to file the required certificate must be set up in the answer as a defense to the action. In either case, the action would only abate, and would not be a bar to another action brought after compliance with the provisions of the statute. *Id.*

PATENTS.

1. PATENT NO. 93,157 FOR NICKEL PLATING INFRINGED.—The defendant has infringed the first and fourth claims of Adams's patent No. 93,157 for nickel plating. *United Nickel Company* v. *California Electrical Works.* (*U. S Cir. Ct.*) *Cal.*, 83.

2. DR. BOETTGER'S PROCESS is not an anticipation of Adams's invention. *Id.*

3. ADAMS'S INVENTION CONSISTS OF A DISCOVERY of the conditions necessary to make nickel plating a practical art, and the process by which it is made available in the pratical uses of life. *Id.*

4. PERSUASIVE EVIDENCE OF NOVELTY.—Where the value of nickel plating had long been known, and a want of it long recognized in the practical affairs of life, without having been supplied, the fact that immediately after a process for nickel plating had been brought to the attention of the world it was extensively adopted in the

arts, and went into widespread use is, of itself, persuasive evidence of the novelty of the process. *Id.*

5. ESTOPPEL BY LICENSE.—Where a patent contains several claims, each claim, substantially, covers a distinct invention, and if the patentee grants a license to use the invention covered by one of the claims onyl, he is not estopped thereby from recovering for an infringement of the invention covered by another and different claim in the same patent, even though the infringement be accomplished by aid of the use of the invention to which the license extends. The license only protects the licensee in the use of the particular invention covered by the license. *Id.*

PAYMENT.

See BONA FIDE PURCHASER, 3; CONTRACT, 7, 11; DEBTOR AND CREDITOR, 1; TENDER.

PERFORMANCE.

See CONTRACT 5; DEBTOR AND CREDITOR; SPECIFIC PERFORMANCE.

PLEADING.

1. INCONSISENT DEFENSES MAY BE SET UP IN ANSWER.—Under section 64 of the code of Colorado, inconsistent defenses may be interposed in an answer. Each defense must be complete in itself, and a full answer to the action, but it is not necessary that the several defenses should be harmonious throughout, or such as will admit of comparison and adjustment in respect to the facts alleged in them. *Hummel, Administrator,* v. *Moore.* (*U. S. Cir. Ct.*) *Col.*, 187.

2. NON-PAYMENT NEED NOT BE ALLEGED.—The complaint in an action on a promissory note need not allege that it is unpaid; and, even if necessary, such negative averment cannot be met by denial. *Id.*

3. ALLEGATION ON INFORMATION AND BELIEF.—An averment that on, etc., "as the plaintiffs are informed and believe," at, etc., the defendant spoke, in the presence of certain named persons, the following words, etc., is a sufficient allegation that, according to the information and belief of the plaintiffs, the defendant did, in fact, speak the words alleged. *McKinney et al.* v. *Roberts. Cal.*, 426.

4. CROSS-COMPLAINT AND ANSWER SHOULD BE DISTINCT.—A cross-complaint should be as distinct and separate from an answer in the same case as any other independent pleading in the cause. Each must stand or fall upon its own merits. *Harrison* v. *McCormick et al. Cal.* 567.

5 WAIVER OF FORMAL OBJECTION TO CROSS-COMPLAINT.—An objection that an answer and cross-complaint were both joined in the same pleading is waived, if the plaintiff consented in writing to allow such pleading to be filed and stand as and for defendants' answer and cross-complaint. *Id.*

6. CONSTRUCTION OF—JURY NOT TO FIND ON ADMITTED FACTS.—The construction of pleadings is for the court, and not the jury, and, in an action of ejectment, where the answer admits the ouster, it is error for the court to instruct the jury that the question of ouster was one of the issues to be tried by them. *Taylor* v. *Middleton. Cal.*, 150.

7. MATTERS OF MERE EVIDENCE, ALLEGED IN A REPLY, may be stricken out on motion. *Bigelow* v. *Scott. Wash.*, 192.

8. JOINDER OF ISSUE ON FACTS DEFECTIVELY ALLEGED, is a waiver of the defect. *Davis* v. *Wait. Or.*, 79.

See AMENDMENT, APPEAL, 19; CONSIDERATION, 1; CONSPIRACY, 1; CONTRACT, 10; COUNTER-CLAIM, 1; COVENANTS, 1; DEMAND; DEMURRER; EJECTMENT, 1, 2; EMINENT DOMAIN, 5, 6; FRAUD, 1, 2; HUSBAND AND WIFE, 1; INTERPLEADER; JUSTICE'S COURT, 4; MECHANIC'S LIEN, 1, 3, 5, 7; NEGLIGENCE, 1; PARTIES; PARTNERSHIP, 4; PUBLIC LANDS, 1; SPECIFIC PERFORMANCE, 1; STATUTE OF LIMITATIONS, 3, 7.

POINTS AND AUTHORITIES.

1. JUDGMENT AFFIRMED FOR FAILURE TO FILE POINTS and authorities. *Whitman* v. *Hay. Cal.*, 483.

POLICE POWER.

See CONSTITUTIONAL LAW, 11.

POSSESSION.

See ASSIGNMENT FOR BENEFIT OF CREDITORS, 2; ATTACHMENT, 8; BONA FIDE PURCHASER, 5; DEMAND, 1, 2; EASEMENT, 3, 4; EJECTMENT, 3; MINES AND MINING, 1–3; MISTAKE, 1; NOTICE, 1–3; PUBLIC LAND, 8, 10, 11; SALE, 3–5, 6; TRUST, 3.

PRACTICE.

See APPEAL; ARGUMENT, 1; CONTINUANCE; DISMISSAL.

PRE-EMPTION.

See PUBLIC LANDS, 7–15.

PRESCRIPTION.

See EASEMENT, 2.

PRINCIPAL AND AGENT.

1. AGENCY—POWER COUPLED WITH INTEREST.—An agency to sell real estate and to receive the proceeds thereof, above a certain amount, is not a power coupled with an interest. *Simpson* v. *Curson.* *Or.*, 637.
2. PERSONAL JUDGMENT AGAINST AGENT.—A finding that the money for which a note and mortgage were given was borrowed by one purporting to act as agent, solely for and on account of the principal, will not warrant a personal judgment against the agent on the note. *Hibernia S. & L. S.* v. *Moore.* *Cal.*, 317.
3. AUTHORITY OF AGENT TO EXECUTE NOTE—FINDINGS.—A finding that a note and mortgage *purport* to be executed in the name of the principal, by her attorney in fact, who, in executing them, assumed to be authorized, is not a finding that such attorney in fact was authorized to execute the note and mortgage. *Id.*
4. AGENT CANNOT MORTGAGE PRINCIPAL'S LAND FOR INDIVIDUAL DEBT.—An attorney in fact, with authority to borrow money and mortgage the land of his principal, cannot give a mortgage thereon to secure his individual debt. A mortgage so given, is not binding on the principal, if the mortgagee knew that the money borrowed was intended to be used by the agent for his individual purposes. *Id.*
5. DECLARATIONS OF AGENT—ADMISSIBILITY OF AGAINST PRINCIPAL—RES GESTÆ.—The declarations of a servant or agent, who is employed to perform a duty, are not admissible against the principal, unless they are part of the facts and circumstances of an act happening within the scope of the employment for which it is sought to make the principal liable. *Durkee* v. *Central Pacific Railroad Co.* *Cal.*, 494.
6. THE SAME—DECLARATIONS OF ENGINEER AS TO CAUSE OF INJURY—NEGLIGENCE.—In an action to recover damages for an injury to a child on a railroad track, alleged to have been caused by the negligence of the engineer of the train, the declarations of the engineer as to how the accident occurred, made about five minutes after the casualty happened, and about three minutes after the child had been taken from under the engine, are admissible against the principal, as part of the *res gestæ*. *Id.*
7. AGENCY—NOTICE.—The knowledge of an agent, in respect to the subject-matter of the agency, is the knowledge of the principal. *Lakin* v. *S. B. G. M. Co.* (*U. S. Cir. Ct.*) *Cal.*, 50.
8. BANK FOR COLLECTION—LIABILITY TO ACCOUNT—CASE IN JUDGMENT.—The plaintiff assigned certain notes to the defendant for collection, from one C., the maker, under an agreement that the defendant would use its best efforts to collect the same, and when collected to pay the proceeds thereof over to the plaintiff, deducting costs and expenses of collecting. The defendant immediately commenced an action against C. on the notes, and on an indebtedness due to it. Judgment was obtained against C., and under the execution there was sold a large lot of clothing, merchandise, etc., the property of C., whith was bid in by the defendant, for a sum sufficient to satisfy the execution, for the benefit of itself and the plaintiff, in order to prevent a sacrifice of the goods. The defendant afterwards sold the goods, but not for enough to satisfy the plaintiff's demand, after paying its own debt and the costs and expenses. *Held*, that neither the plaintiff nor defendant was entitled to payment in full out of the proceeds of the sale; that they were each entitled to share in the proportion in which their claims against C. had paid the purchase-price; and that the plaintiff became entitled to his share thereof, after sale, upon demand. *Marks* v. *Bodie Bank.* *Cal.*, 327.

9. VENDOR AND VENDEE—VENDEE'S DUTY TO DISCLOSE.—Ordinarily, where there is no fiduciary relation between the vendor and vendee of land, and no confidence is reposed by the vendor in the particular contract, no duty rests upon the vendee to disclose facts he may happen to know advantageous to the vendor. *Savage* v. *Savage*. *Or.*, 369.

10. THE SAME—PURCHASE BY ATTORNEY IN FACT—CONCEALMENT BY ATTORNEY.—An in fact to collect debts due, and lease the lands of another, in whom particular trust and confidence is imposed by the principal, cannot purchase the lands of the latter without disclosing to the principal every fact within his knowledge that would tend to enhance its value. *Id.*

11. A PURCHASE MADE WITHOUT such disclosure will be set aside at the instance of the principal. *Id.*

PRIORITIES.

See PUBLIC LANDS, 13, 15.

PRIVILEGED COMMUNICATIONS.

See EVIDENCE, 3.

PROBATE SALES.

See ESTATES OF DECEASED PERSONS, 5.

PROMISE.

See CONSIDERATION, 2.

PROMISSORY NOTE.

1. PROMISSORY NOTE—STIPULATION FOR FORFEITURE OF CREDIT—MISCONDUCT OF PAYOR—PAYMENT OF INTEREST.—The defendant executed to the plaintiff's testator a promissory note, payable at Salem, in the county of Marion. The note provided that the interest should be paid annually, and in the event of its not being paid when it became due, that the principal and interest should become due and payable at the option of the holder. Subsequently the plaintiff removed to Portland, and resided there when the annual interest fell due. Several days prior to the date when the interest fell due, the defendant wrote to her inquiring to whom he should pay the interest at Salem, or, if she preferred, he would send a check for the amount. To this letter she did not reply, nor did she come to Salem to receive the interest, or designate any person or bank to receive it for her. The defendant was at Salem, ready and willing to pay the interest, but did not make a payment of it into any bank. *Held*, that the conduct of the plaintiff was such as to prevent her from claiming a forfeiture of the credit as to the whole of the note. *Adams, Administratrix, etc.* v. *Rutherford et al.* *Or.*, 452.

See CONSIDERATION, 4; INFANTS, 1.

PROTESTANT EPISCOPAL CHURCH.

1. PROTESTANT EPISCOPAL CHURCH—ELECTION OF VESTRYMEN—NOTICE OF.—Canon 4 of the Protestant Episcopal Church of the United States provides that the election of vestrymen shall be held "on Easter Monday of each year, or as soon thereafter as practicable," and that "notice of such election shall be given during divine service upon the Sunday previous thereto:" *Held*, that notice of an election, not held on Easter Monday, was requisite to its validity; and that a notice given at a service commenced and conducted much earlier than the appointed hour for divine service was insufficient. *Dahl et al.* v. *Palache et al.* *Cal.*, 480.

PUBLIC LANDS.

1. PURCHASE OF STATE LANDS—CONTEST BETWEEN APPLICANTS—ALLEGATIONS OF PLEADINGS.—In an action to determine a contest, arising in the surveyor-general's office, as to which of the parties is entitled to purchase certain school land from the state, each party is an actor, and must state in his pleadings all the facts upon which he relies as showing his right to become the purchaser, and the steps he has taken to avail

himself of and secure his right to make the purchase; and failing so to do, he has no standing in court. *Dillon* v. *Saloude et al.* *Cal.*, 558.

2. THE SAME—LANDS NOT FIT FOR CULTIVATION—ACTUAL SETTLER.—Article 17, section 3 of the constitution of 1879, providing that "lands belonging to the state, which are suitable for cultivation, shall be granted only to actual settlers," prohibits the sale of any land belonging to the state, which is suitable for cultivation, to one who is not an actual settler thereon, even though his application to purchase was made before the constitution was adopted, and when settlement was not required. But it does not prohibit the sale of land to one who was an actual settler thereon, though the fact of his settlement was not stated in the affidavit accompanying his application, nor does it prevent or in any way affect, the sale of lands which were not suitable for cultivation. *Id.*
3. THE SAME—APPLICATION FOR PURCHASE—CONTENTS OF.—Section 3495 of the political code, as amended in 1880, requiring that any one desiring to purchase any portion of a sixteenth or thirty-sixth section shall state in his affidavit, among other things, "that he is an actual settler thereon," does not cancel or make void any application to purchase theretofore filed. It applies only to applications thereafter to be made, and leaves those before made as they would have been if the amendment had not been passed. *Id.*
4. THE SAME.—An application to purchase state lands, not fit for cultivation, made prior to the amendment of 1880 to section 3495 of the political code, was not required to state that the applicant was an actual settler on the land. *Id.*
5. CONTEST FOR PURCHASE OF STATE LAND—EVIDENCE—FINDINGS.—In an action to determine a contest between applicants for the purchase of land from the state, as provided for under sections 3414–3416 of the political code, the evidence reviewed and held to support the findings and judgment in favor of the plaintiff. *White* v. *Douglass.* *Cal.*, 303.
6. BOARD OF REGENTS—INSTRUCTONS FOR PURCHASE OF LAND—RATIFICATION OF.—Instructions purporting to emanate from the board of regents and addressed to the land agent of the university, directing him to receive applicantions for surveyed land in accordance with a designated manner, will be held to be the instructions of the board, if subsequently recognized, acted upon, and enforced by them. *Id.*
7. PRE-EMPTION—PUBLIC LANDS—TOWN LOTS.—The statutes of the United States, providing for the pre-emption of public lands, were not intended to apply to town lots. *Tucker et al.* v. *McCoy.* *Col.*, 358.
8. THE SAME—LAND IN OCCUPANCY OF ANOTHER.—The right of pre-emption cannot be exercised as to lands which are at the time in the occupancy of another. *Id.*
9. THE SAME—EVIDENCE—FINDINGS.—In a suit to determine which of the parties was entitled to a deed to certain town lots, the evidence held to support the findings and decree. *Id.*
10. ONE PERSON CANNOT ENTER UPON THE POSSESSION OF ANOTHER for the purpose of pre-emption. *Kendall* v. *Waters.* *Cal.*, 183.
11. PRE-EMPTION—LAND IN OCCUPANCY OF ANOTHER.—The right to pre-empt public lands cannot be exercised upon land occupied by another. *Reinhart et al.* v. *Bradshaw.* *Nev.*, 711.
12. THE SAME—PRE-EMPTION BY TENANT IN COMMON.—The possession of one tenant in common of public lands inures for the benefit of his co-tenant. Consequently, the tenant in possession cannot acquire a right of homestead to such lands. *Id.*
13. PRE-EMPTION OF PUBLIC LAND—PRIORITY OF LOCATION—RELATION OF TITLE—Judgment affirmed for the reasons stated in the opinion in department, reported in 4 West Coast Rep. 295. *Cothrin* v. *Faber et al.* *Cal.*, 195.
14. LIEU LANDS—PRE-EMPTION—PATENT FROM STATE—ATTACKING VALIDITY OF.—The land in controversy was listed to the state as lieu on March 13, 1877, on an application and selection made by it on October 1, 1873. On July 31, 1879, the patent of the state was issued to plaintiff's grantor. The defendant claimed under a pre-emption settlement made in November, 1870, prior to the inception of any rights on the part of the state. *Held*, that the defendant could not attack the validity of the listing to the state without connecting himself with the United States, the original source of title. To do this, under his claim of pre-emption, he must show that he was, at the time of the selection made by the state, in privity with the United States. To establish this privity he must show that he was a duly qualified pre-emptor according to law, and had fully complied with the laws of the United States at the time existing requisite to acquire the right of pre-emption. Neither could he attack the patent by the state without showing some privity with the state *Schiefferly* v. *Tapia.* *Cal.*, 419.

15. TIME FOR FILING DECLARATORY STATEMENT—PRIORITIES.—The survey of the township, containing the land in controversy, was filed in the proper district land-office on June 13, 1872. The defendant filed his declaratory statement on December 20, 1873. *Held*, under the statute of the United States requiring the pre-emption-right claimant to file his declaratory statement within three months from the date of the receipt at the district land-office of the approved plat of the township, embracing his pre-emption settlement, that defendant's declaratory statement was not filed in time; that the claim of the state was therefore prior in point of time, and by reason of such priority its title derived by the listing in 1877 was superior in right. *Id.*

16. NORTHERN PACIFIC RAILROAD COMPANY—LAND GRANT—ACT OF CONGRESS CONSTRUED.—The act of congress granting lands in aid of the Northern Pacific Railroad is not only a law but a conveyance, and imports a present and immediate transfer of title to the company of the lands described in the grant, which takes effect by relation, as of the date of the act, whenever the lands so conveyed are designated by the definite location of the line of the road. *Northern Pacific R. R. Co.* v. *Lilly. Mont.*, 727.

17. THE SAME—FIXING GENERAL ROUTE OF ROAD—RESERVATION OF LAND.—Under such act, whenever the general route of the road had been fixed, the lands thereby granted were reserved from sale and held for the company, whether before or after the same had been surveyed; and thereafter no person could acquire any title thereto or interest therein, save by the act of the company. Such reservation was equivalent to a sale of the lands to the company, to the extent of giving it the right to protect the same as against all other persons. Having the exclusive right to sell the lands and to deliver possession, the company, to all intents and purposes, had the possession; and this, accompanied with the right to sell and to convey title, gave the company the right to protect their possession by action of ejectment or otherwise. *Id.*

See EASEMENT, 2; MARSH LANDS.

PUBLIC OFFICERS.

1. PUBLIC OFFICERS—LEGISLATURE MAY REDUCE SALARIES.—Salaried public offices, created by the legislature, are not held by contract or grant. The legislature has full control over them, unless restricted by the constitution, and may abolish them altogether, or impose upon them new duties or reduce their salaries. But, under the constitution of 1879, the legislature, in exercising its power over such officers, must control and regulate them by general laws. *Miller* v. *Kister. Cal.*, 341.

2. COUNTY GOVERNMENT ACT OF 1883—AMENDATORY ACTS OF 1885 CONSTRUED—SPECIAL LEGISLATION.—The acts of 1885, amending the county government act of 1883, are general laws upon the subjects embraced by them, *i. e.*, the classification of counties, and the compensation of officers within the classified counties. But as general laws, the legislature restricted their operation as follows: "Sec. 3. The salaries herein provided shall not take effect nor be in force until the expiration of the terms of the present officers, except as hereinafter provided. Sec. 4. The salaries herein provided for the officers of the tenth, thirty-fifth, and forty-sixth classes shall take effect and be in force from and after the first day of the first month next succeeding its passage." *Held*, that such restriction prevented the uniform operation of the law, and was, in effect, special and local legislation, and therefore unconstitutional, under subdivision 29, article 4, of the constitution. *Id.*

3. TITLE TO OFFICE—ACTION TO RECOVER FEES.—Title to an office may be determined in an action by the claimant thereof, for money had and received, to recover the fees from a wrongful intruder. In such action the measure of damages is the amount of fees collected by the intruder. *Wenner* v. *Smith. Utah*, 746.

4. EX OFFICIO OFFICER—MERGER OF OFFICES.—Making a person an *ex officio* officer, by virtue of his holding another office, does not merge the two offices into one. *State ex rel. Attorney General* v. *Laughton. Nev.*, 9.

5. LIEUTENANT-GOVERNOR—EX OFFICIO STATE LIBRARIAN—FAILURE TO GIVE BOND.—The failure of the lieutenant-governor to give the bond required by statute, as *ex officio* state librarian, does not create a vacancy in the office of lieutenant-governor. *Id.*

6. THE SAME—LEGISLATURE COULD MAKE LIEUTENANT-GOVERNOR EX OFFICIO STATE LIBRARIAN.—There is nothing in the constitution of Nevada prohibiting the same person from holding the office of lieutenant-governor, and the office of state librarian. Such being the case, the legislature had power to create the last-named office, and make the lieutenant-governor *ex officio* state librarian, and to impose reasonable conditions precedent to the holding of the legislative office. It had power to require

the giving of a bond to secure a faithful discharge of the duties of that office, and to provide that such bond should be kept good, and in case of failure so to do, that the office should become vacant. *Id.*

7. THE SAME—BOND OF STATE LIBRARIAN—SURETIES ON, HOW RELEASED.—The act of February 17, 1883, making the lieutenant-governor *ex officio* state librarian, and the act of March 1, 1883, requiring the *ex officio* state librarian to give a bond, must be construed together with the provisions of the general statutes declaring under what circumstances an office shall become vacant, providing for the release from liability of any surety, and prescribing the result of a failure to file a new or additional bond, within the time stated, after the filing by a surety of a legal statement in the office of the governor or secretary of state, and the service of a legal notice upon the officer. *Id.*

8. THE SAME—A SURETY OF AN OFFICIAL BOND, IN ORDER TO BE RELEASED from future liability, must proceed, in substance, according to the requirements of section 2930 of the compiled laws. *Id.*

9. THE SAME—NOTICE AND STATEMENT FOR RELEASE OF SURETY.—Under such section, a surety desiring to be released from an official bond must file with the governor, or with the secretary of state, a statement in writing, duly subscribed by him, or some one in his behalf, setting forth the name of the office of the person for whom he is surety, the amount for which he is liable as such, and his desire to be released from further liability on account thereof; and a notice containing the objects of such statement must be served personally on the officer: *Held*, that such notice and statement need not be contained in two separate papers; that the notice need not state the time when nor the place where the statement was filed; that the statement and notice in the present case were sufficient, and that the latter was personally served on the respondent. *Id.*

10. PROBATE JUDGE—VACANCY IN OFFICE—APPOINTMENT BY GOVERNOR.—Under the act of congress of August 7, 1882, the governor had authority to fill a vacancy in the office of probate judge caused by a failure to elect such officer at the time appointed for the general election. *Wenner* v. *Smith*. *Utah*, 746.

11. SUMMARY PROCEEDING TO REMOVE OFFICER.—The summary proceedings provided by section 772 of the penal code are aimed at certain public officers as such, with the object of removing them from office, and when they cease to hold office they are no longer amenable to such proceeding. *In re Smith* v. *Ling*. *Cal.*, 692.

12. THE SAME—DEFECTIVE INFORMATION.—An information under such section is defective if it cannot be determined therefrom, with certainty, whether the defendant is sought to be charged with "charging and collecting illegal fees for services rendered" or with refusal or neglect to perform the official duties pertaining to his office; or when, treated as an information for charging illegal fees, it fails, except by way of recital, to show that such fees were illegal or were collected; or when there is no charge that the defendant knowingly, willfully, or corruptedly charged and collected illegal fees or neglected to perform any official duty. *Id.*

See ATTORNEY-GENERAL; CONSTITUTIONAL LAW, 2, 3; DENVER, 2-4; ELECTION; FEES.

PUBLIC POLICY.

See CONTRACTS, 8.

PUBLIC USE.

See EMINENT DOMAIN.

QUIET ENJOYMENT.

See COVENANTS, 1.

QUIETING TITLE.

See PARTIES, 2.

QUO WARRANTO.

1. PROCEEDING TO OUST JUDGE.—In a proceeding to oust defendant from the office of judge of the district court, *held*, that in so far as the matters stated inthe present information refer to defendant's disqualification to take the office in the first

instance, the ground was fully covered by the former proceeding and decision, reported in 7 West Coast Rep. 24; that the matters now charged for the first time constitute a new and different cause of action, and that the supreme court is without jurisdiction, under the constitution, to entertain and investigate the same by proceedings in the nature of *quo warranto*. *People ex rel. Attorney-general* v. *Goddard*. *Col.*, 591.

2. JURISDICTION OF COURT, WHEN ABROGATED—SOLE JURISDICTION CONFERRED ON BOARD.—The provisions of the amended charter of the city of Denver, that the legislative powers of the city shall be vested in a council, consisting of a board of aldermen and a board of supervisors, and that each board shall be the sole judge of the qualification, election, and return of its own members," has the effect to deprive the courts of all jurisdiction to inquire, by *quo warranto*, into the right of office of a member of such councils, elected at the first election after the adoption of the charter. *Darrow* v. *People*. *Col.*, 267.
3. FILING OF INFORMATION BY DISTRICT ATTORNEY.—The fact that the district attorney of the proper district subscribes and presents the information in *quo warranto* proceedings, implies that such officer has fully investigated the merits of the case, and the proceeding, though on the relation of a private person, is instituted in good faith and upon sufficient grounds. *Id.*
4. TAX-PAYER HAS SPECIAL INTEREST.—One who is a tax-payer has a sufficient special interest to entitle him to present an information in a proceeding of *quo warranto*, to inquire into the right of office of a member of a board having authority to levy taxes. *Id.*

RAILROAD.

See NEGLIGENCE, 5, 6, 9, 10.

REDEMPTION.

1. REDEMPTION BY JUDGMENT DEBTOR—PAYMENT OF PRIOR LIEN OF EXECUTION PURCHASER. Under section 702 of the code of civil procedure, a judgment debtor is entitled to redeem property sold under execution upon paying to the purchaser the amount of his purchase, with two per cent per month thereon up to the time of redemption, together with the amount of any assessment or taxes which the purchaser may have paid thereon after purchase, and interest on such amount, without paying a prior judgment against him, held by a partnership of which the execution purchaser is a member. *Campbell* v. *Oaks*. *Cal.*, 474.

REFERENCE.

1. REFERENCE—ORDER FOR JUDGMENT—ENTRY OF JUDGMENT BY CLERK.—A stipulation for reference authorized the referee to determine all issues, and provided that upon the filing of his report judgment should be thereupon entered in accordance therewith. In the order for reference, the court directed judgment to be entered in accordance with the referee's report. *Held*, that upon the filing of such report, the clerk had authority to enter judgment without any further order of court. *Bowie* v. *Borland*. *Cal.*, 502.

REFORMATION.

See INSURANCE, 6.

REHEARING.

1. REHEARING DENIED. *Sweeney* v. *Schultes et al.* *Nev.*, 360.
2. REARGUMENT ORDERED. *Little* v. *Jacks*. *Cal.*, 713.

REMOVAL OF CAUSES.

1. REMOVAL OF CAUSES—JURISDICTION OF UNITED STATES COURT LIMITED BY RESTRICTIONS ON JURISDICTION OF STATE COURT.—The United States circuit court, in an action removed to it from a state court, is subject to the same limitations and restrictions respecting jurisdiction which obtain in the court from which it was removed. Thus, when the jurisdiction of the county courts of Colorado is limited to two thousand dollars, in an action removed therefrom to the United States circuit court, a counter-claim exceeding such amount cannot be interposed. *Hummel* v. *Moore*. (*U. S. Cir. Ct.*) *Col.*, 187.

REPLEVIN.

1. REPLEVIN—DESCRIPTION OF PROPERTY—CERTAINTY.—The complaint in an action of replevin must describe the property claimed with reasonable certainty. It need not describe it with so great minuteness that an officer with his writ alone would be able to distinguish it from other property of the same kind. *Foredice* v. *Rinehart. Or.*, 521.

2. THE SAME—DEFENDANT, AFTER JUDGMENT, CANNOT OBJECT.—In such action, a defendant who retains the property during suit cannot, after judgment is rendered against him for its return, object to the uncertainty of description. *Id.*

3. UNDERTAKING FOR RETURN OF PROPERTY TAKEN FROM MARSHAL—ACTION ON—JURISDICTION OF FEDERAL COURTS.—Goods in possession of a marshal of the United States cannot be taken in replevin by process from a state court. Where such a proceeding is attempted an undertaking given for the return of the goods may be treated as a forthcoming bond, on which the marshal may maintain an action in his own name in the federal court, and this irrespective of the question of the citizenship of himself and the obligors in the bond. So may any one beneficially interested in the bond. Jurisdiction in such subordinate and ancillary proceedings rests upon the jurisdiction acquired in the original action. *Paterson et al.* v. *Mater et al.* (*U. S. Cir. Ct.*) *Col.*, 705.

REPORTERS.

1. OFFICIAL SHORT-HAND REPORTERS—ACT OF MARCH 21, 1885, UNCONSTITUTIONAL—LEGISLATIVE ACT.—The act of March 21, 1885, amending section 274 of the code of civil procedure, in respect to the payment of salaries of reporters, provides that "the official reporter shall receive, as compensation for his services, a monthly salary, to be fixed by the judge, by an order duly entered on the minutes of the court, which salary shall be paid out of the treasury of the county," etc.: *Held*, that such provision was in conflict with section 1 of article 3 of the constitution, in that it imposed legislative powers upon the judiciary. *Smith* v. *Strother, Auditor, etc. Cal.*, 423.

2. THE DISTINCTION BETWEEN A LEGISLATIVE AND A JUDICIAL ACT is that the former establishes a rule regulating and governing in matters or transactions occurring after its passage. The other determines rights or obligations of any kind, whether in regard to persons or property, concerning matters or transactions which already exist, and have transpired before the judicial power is invoked to pass on them. *Id.*

See FEES, 2.

RESCISSION.

See FRAUD, 3, 4.

RESERVATION.

See DEDICATION, 1; DEEDS, 6.

RIGHT OF WAY.

1. RIGHT OF WAY—AGREEMENT FOR—PAROL EVIDENCE OF TRESPASS—FRAUD.—Plaintiff and defendant held land in common, the defendant had used the right of way in question for some time, when they entered into an agreement for the partition of the land; the defendant agreed to accept a certain portion of the land as his share, provided the right of way claimed went with it; the plaintiff promised that it should, and that he would procure deeds in which that right should be reserved; the defendant relied upon the promise of the plaintiff in the matter, but by the fraudulent conduct of the plaintiff, the partition deeds omitted to reserve to the defendant the right of way. In an action to recover for a trespass by the defendant, in tearing down a fence erected by the plaintiff, over such way, the defendant answered by setting up such agreement and the fraudulent conduct of the plaintiff. *Held*, that parol evidence of the same was admissible, and that the exclusion thereof was error. *Peterson* v. *Lauretzen. Cal.*, 172.

See EMINENT DOMAIN, 3.

RIOT.

1. RIOT—INDICMENT SPECIFYING OTHER CRIME—SURPLUSAGE.—Statements in an indictment for riot, which shows that the crime of robbery was all committed, will be regarded as surplusage, when it appears that there was no intention to indict for that crime, and the indictment is otherwise sufficient, under section 639 of the criminal statutes. *State* v. *Louey et al.* *Or.*, 410.
2. THE SAME—ALLEGATION OF INDICTMENT.—In such indictment it is sufficient to allege that the defendants "did encourage the other persons participating" in the said riot "to acts of violence and force." *Id.*

RIPARIAN PROPRIETORS.

1. RIPARIAN PROPRIETOR—ACTION FOR DIVERSION OF WATER—EVIDENCE OF INJURIES MUST BE CONFINED TO RIPARIAN LANDS.—In an action by an alleged riparian owner, to recover damages for injuries to plaintiff's lands and cattle by reason of a diversion of the waters of the stream, evidence of injuries to land not specified in the complaint, or to lands and cattle pastured thereon, not bordering on the stream, is inadmissible. *Heinlen* v. *Fresno Canal and Irrigation Co.* *Cal.*, 184.

ROADS.

See EMINENT DOMAIN, 5–12; STREETS AND ROADS.

SALE.

1. SALE SUBJECT TO GRADER'S REJECTION—RETENTION OF GOODS BY VENDEE.—Plaintiffs sold and delivered to defendants a certain lot of wool at a given rate per pound, "subject to grader's rejection." The term "grader's rejection" meant that upon receipt of the wool by the vendees they would place it in the hands of wool graders for the purpose of ascertaining what portion, if any, was inferior, for which, after notice to the vendors, a deduction from the contract price was to be allowed to the vendee. The custom of the place of sale required the graders to examine the wool fleece by fleece. *Held*, that it was the duty of the defendants to have the examination conducted in such manner; that upon their failure so to do, after retaining the wool, they were liable for the contract price; and this, although after the plaintiffs' refusal to abide by their decision they offered to have it graded fleece by fleece. *Meherein et al.* v. *Ball et al.* *Cal.*, 432.
2. SALE OF STANDING TIMBER—CONTRACT FOR—MEASURE OF DAMAGES.—In an action to recover damages for breach of a contract for the sale of certain standing timber, the measure of damages is the difference between the contract price and the market value of the timber standing at the time the cause of action arose. *Mackey et al.* v. *Olsen.* *Or.*, 78.
3. CHANGE OF POSSESSION—SUBSEQUENT PURCHASER WITH NOTICE.—Under sections 1523 and 1530 of the general statutes a sale of personal property, unaccompanied by an actual and continued change of possession, is not void as to subsequent purchasers from the vendor who had notice of the claims of the prior purchaser. *McKee* v. *Basick M. Co.* *Col.*, 287.
4. POSSESSION—CONTRADICTORY INSTRUCTIONS.—Judgment reversed for contradictory and misleading instructions as to the effect of a sale of personal property, not in the possession of the vendor, and not accompanied by change in the possession. *Agnew* v. *Kimball.* *Cal.*, 501.
5. BILL OF SALE—IDENTIFICATION OF PROPERTY SOLD A QUESTION OF FACT.—Whether a barn was intended to be included within a bill of sale, in which the property sold was described as "the Wolfe houses," is a question of fact for the jury, and it is error for the court to instruct the jury that the bill of sale could not include the barn. *Claffey* v. *Hartford Fire Insurance Company.* *Cal.*, 353.
6. SALE OF PERSONAL PROPERTY EXEMPT FROM EXECUTION—ACTUAL AND CONTINUED CHANGE OF POSSESSION NECESSARY.—A sale of personal property is void as against creditors of the vendor, unless followed by an actual and continued change of possession, although such property was exempt from execution in the hands of the vendor. The right of exemption is a personal privilege, which, if not claimed, is waived by the debtor. *Barton* v. *Brown.* *Cal.*, 169.

See ATTACHMENT, 8; WARRANTY, 1.

SCHOOL TRUSTEES.

See CONSTITUTIONAL LAW, 2.

SEARCH-WARRANT.

1. WARRANT TO SEARCH PERSON—ISSUANCE OF—WHEN AUTHORIZED.—Neither article 4 of the amendments to the United States constitution, nor section 19 of article 1 of the state constitution, prohibit the issuance of a search-warrant of the person of an individual in a proper case. Therefore, subject to the limitations of those constitutions, and subject to the limitations that body may itself prescribe, it is within the power of the legislature to authorize the issuance of such a warrant. This power has been exercised by the enactment of sections 1523 to 1542, inclusive, of the penal code. *Collins* v. *Lean.* *Cal.*, 676.
2. THE SAME—PROPERTY MAY BE TAKEN UNDER, ALTHOUGH NOT ON PERSON—LOTTERY-TICKETS.—Under a warrant, regularly issued, authorizing an officer to make immediate search of the person of an individual for lottery-tickets, and if any were found to bring them before the justice of the peace issuing the warrant, the officer may, in the execution thereof, take and remove lottery-tickets, the property of and in possession of the person against whom the warrant was directed, although the same were not found on his person. *Id.*
3. THE SAME—PRESUMPTION THAT PROPERTY TAKEN IS DELIVERED TO MAGISTRATE.—It is presumed, in the absence of a showing to the contrary, that the officer who so takes possession of such lottery-tickets delivers them to the magistrate as commanded by the search-warrant. Having done so, by the the tickets are not in law in the custody of the officer, or under his control, but in that of the magistrate, under section 1536 of the penal code, subject to the order of the court, to which the proceedings before him must be returned. *Id.*

SERVICE.

See APPEAL, 22.

SHERIFF.

See ATTACHMENT, 3, 4.

SLANDER.

1. DEFENDANT MAY WITHDRAW OBJECTIONABLE CHARGE IN ANSWER.—In an action for slander the defendant may withdraw a charge made against the plaintiff's reputation in his first answer, and, by the court's permission, file an amended answer leaving the objectionable matter out, and thereafter the plaintiff cannot show that such charge had been preferred on a previous trial, and attempted to be established by evidence. *Morris* v. *Lachman.* *Cal.*, 305.
2. BELIEF OF DEFENDANT—MITIGATION OF DAMAGES.—In such action, where the slanderous words were that plaintiff was a "horse-thief and scoundrel," the defendant may testify as to his belief that his property had been stolen at the time he used the language, as tending to show his good faith, in mitigation of damages. *Id.*
3. WANT OF CHASTITY—SPEAKING OF WOMAN AS PARAMOUR.—Under section 46 of the civil code, it slanderous, as imputing want of chastity, to speak of a married woman as the paramour of a man not her husband. *McKinney* v. *Roberts.* *Cal.*, 426.

SPECIFIC PERFORMANCE.

1. SPECIFIC PERFORMANCE—ALLEGATION OF PERFORMANCE.—In an action for the specific performance of a contract for the sale of land, allegations of performance by the vendee held sufficient. *Alpers* v. *Knight.* *Cal.*, 81.
2. THE SAME—EQUITABLE TITLE PASSES WITH DEED FROM VENDEE.—A deed from the vendee, under a contract for the sale of land, transfers the equitable title to the grantee, and gives him the right to demand a conveyance from the vendor, or from a subsequent purchaser, with notice. *Id.*

STATUTES.

1. STATUTE, HOW CONSTRUED.—When the words of a statute are not explicit the intention is to be collected from the context, from the occasion and necessity for the law, from the mischief felt, and the object and remedy in view. *Wenner* v. *Smith*. *Utah*, 746.

2. REPEAL OF STATUTES BY IMPLICATION.—The repeal of statutes by implication is not favored, and where there is an apparent conflict between two acts, the court should reconcile them if possible; but if this cannot be done, then the last act must govern. *Yick Wo, In re*. *Cal.*, 548.

3. THE SAME—PRINCIPLES OF CONSTRUCTION.—Where a subsequent statute is repugnant to a prior one, the latter operates without any repealing clause as a repeal of the former, or where not repugnant, if it clearly appears that it was intended as a revision or substitution for the former, it will repeal it so far as revised or substituted. *Id.*

4. SELLING LIQUORS WITHOUT LICENSE—REPEAL OF ACT CREATING OFFENSE.—Section 726, so-called, of the code of criminal procedure, remained a part of the act from which it was taken (title 1, chap. 28, Misc. Laws), and has never been incorporated into the code of criminal procedure by any action of the legislature. Such section was repealed by the act of February 17, 1885, by implication. *State* v. *Gaunt*. *Or.*, 656.

5. REPEAL OF STATUTE IMPOSING PENALTY—SUBSEQUENT ENACTMENTS.—A penalty is an incident of the offense for which it is provided, and cannot stand without it. Consequently, upon a repeal of the provisions of an act creating the offense, the provisions fixing the penalty are also repealed, and cannot be made applicable to a subsequent act creating the same offense, unless there is an express declaration to that effect by the legislature. *Id.*

6. A PENALTY CANNOT BE RAISED BY IMPLICATION, but must be expressly created and imposed. *Id.*

STATUTE OF FRAUDS.

1. REAL ESTATE BROKER—AGREEMENT FOR EMPLOYMENT OF, MUST BE IN WRITING.—Under subdivision 6 of section 1624 of the civil code, a real estate broker cannot recover reasonable compensation for services performed by him, in bringing about an exchange of real property, for the defendant, unless the agreement, authorizing the plaintiff to perform such services, was in writing, subscribed by the defendant. *Myres* v. *Surryhne*. *Cal.*, 175.

2. VERBAL SALE—STATUTE OF FRAUDS—RECEIPT AND ACCEPTANCE BY BUYER.—Under section 739 of the civil code, a verbal contract for the sale of personal property, for a price of two hundred dollars or more, is invalid, when no part of the price is paid at the time of sale, unless the buyer accepts and receives part of the thing sold. A mere receipt without an acceptance is not sufficient to take the contract out of the statute of frauds. *Jamison et al.* v. *Simon et al.* *Cal.*, 171.

3. ORAL AGREEMENT AS TO DIVISION LINE.—Adjoining proprietors may orally agree between themselves that a certain fence shall be and constitute the division line between their lands. *Adair* v. *Crane et al.* *Cal.*, 184.

4. THE SAME—VERBAL AGREEMENT AS TO DIVISION LINE—STATUTE OF FRAUDS.—A verbal agreement between such proprietors to have the true line surveyed and to abide by the line thus established, is binding. Such agreement is not within the statute of frauds. *Smith* v. *Roberts*. *Cal.*, 503.

STATUTE OF LIMITATIONS.

1. STATUTE OF LIMITATIONS IN EQUITY.—The statute of limitations, as such, is not a defense in a court of equity of the United States. The defense in such court is, laches in not pursuing the proper remedy, for such time, and under such circumstances, as renders it inequitable to grant the required relief. *Lakin* v. *S. B. Q. M. Co.* (*U. S. Cir. Ct.*) *Cal.*, 50.

2. ANALOGY TO STATUTE OF LIMITATIONS.—But courts of equity will adopt, by analogy, the time prescribed by statutes of limitations, unless there are other equitable circumstances, deemed sufficient to relieve the party from the charge and consequences of laches. *Id.*

3. PLEADING OF LACHES, ETC.—No formed plea of the statute of the limitations, or of the special facts, is necessary to raise the defense of laches, neglect, or acquiescence, in a court of equity. *Id.*

4. THE FOUR YEARS LIMITATION applies to this case, as stated in the eighth head-note, it not being, technically, a suit for "relief on the ground of fraud." *Id.*
5. STATUTE OF LIMITATIONS—CONSTRUCTIVE TRUST.—The statute does not begin to run against a *cestui que trust* in possession, until an ouster, whether the trust be express or implied. *Id.*
6. LACHES.—What equitable circumstance will defeat the defense of laches, considered. *Id.*
7. STATUTE OF LIMITATIONS—PLEADING—EVIDENCE UNDER.—Under section 458 of the code of civil procedure, giving the right to plead the statute of limitations by referring to the section prescribing the time within which an action may be brought, the reference to the section when thus made stands in lieu of, and warrants the proof of every essential fact, precisely as though set out at full in the answer. *Hagely* v. *Hagely.* *Cal.*, 752.
8. FINDINGS ON STATUTE OF LIMITATIONS—SUFFICIENCY OF.—A plea that plaintiff's cause of action is barred by certain sections of the code of civil procedure, are sufficient, if the same are as broad and as specific as the plea. *Oakland Gas Light Co.* v. *Dameron et al.* *Cal.*, 154.
9. DEFENSE OF STATUTE OF LIMITATIONS MUST BE FOUND ON.—The failure of the court to find on the defense of the statute of limitations is error. *Heinlen* v. *F. C. & I. Co.* *Cal.*, 184.
10. STATUTE OF LIMITATIONS—WAIVER OF DEFENSE.—The defense of the statute of limitations must be taken advantage of by demurrer or answer; otherwise it is waived. *Kelley* v. *Kriess.* *Cal.*, 466.
11. STATUTE OF LIMITATIONS—WAIVER OF BY WRITING—EVIDENCE—RES GESTÆ.—Where issue is joined on the bar of the statute of limitations, in an action on certain promissory notes, and the plaintiff relies upon a writing, signed by the defendant, waiving the benefit of the statute of limitations, parol evidence is admissible of the circumstances under which such writing was executed, as part of the *res gestæ.* *Cross* v. *Zellerbach et al.* *Cal.*, 348.
12. THE FINDING REVIEWED AND HELD SUPPORTED by the evidence. *Id.*
13. JUDGMENT AFFIRMED on the authority of Cross v. Zellerbach, 63 Cal. 635. *Id.*
14. PROMISSORY NOTE—PAYMENT OF INTEREST AFTER MATURITY—STATUTE OF LIMITATIONS.—A payment of interest on a promissory after maturity, and the indorsement of such payment thereon, prevents the statute of limitations from running prior to the time of such payment. *Yesler* v. *De Koslowski.* *Wash.*, 193.
15. SHERIFF'S SALE—STATUTE OF LIMITATIONS AGAINST PURCHASER.—A sale of real estate under execution took place on November 22, 1875. The purchaser became entitled to a sheriff's deed on May 23, 1875. *Held*, that an action of ejectment commenced by one claiming under him, on April 18, 1881, was not bared by the statute of limitations; and this, whether the statute commenced to run as soon as the deed might have been made to the purchaser, or not until it was actually made and delivered. *Barroilhet* v. *Anspacher et al.* *Cal.*, 323.

See ADVERSE POSSESSION, 5; AMENDMENT, 3, 4; CORPORATIONS, 2; ESTATES OF DECEASED PERSONS, 5; MORTGAGE, 9; PARTITION, 3; TAXATION, 12.

STOCK EXCHANGE.

1. SAN FRANCISCO STOCK EXCHANGE—SEATS IN, MAY BE SOLD UNDER EXECUTION—FORECLOSURE OF LIEN.—The San Francisco Stock and Exchange Board is a voluntary association, consisting of one hundred members, formed for the purpose of dealing in and buying and selling stocks on commission. The Company of Associated Stockbrokers is a corporation composed solely of the members of said voluntary association; the members of the association and corporation are entitled to an equal share of its property, effects, and assets; the only qualification for membership in the corporation is that such member shall be a member in good standing of the voluntary association, and shall sign the constitution and by-laws of the corporation; the corporation was formed for the purpose of receiving donations with which to purchase land on which to erect a building for the use of its members, and has no shares or capital stock; each member's right and title to the property, goods, effects, and assets of the association, and the privilege of participating in the meetings of the board, is represented by what is called and known as a "seat in the San Francisco Stock and Exchange Board." By the rules of the board, each member has the right to voluntarily dispose of his seat in the same, but the purchaser, before he

can participate in the proceedings of the board, must be elected a member thereof. *Held*, that the property, the legal title to which stands in the corporation called the Company of Associated Stockbrokers, is, in equity, the property of the members of the San Francisco Stock and Exchange Board; that the power given to each member of the board to "dispose" of his seat includes the power to dispose of it absolutely or conditionally; that such member could assign his seat as security for an indebtedness; that the lien thereby created could be foreclosed in a judicial proceeding, and the seat sold, subject to the rules of the association. *Clute* v. *Loveland*. *Cal.*, 489.

STOCKHOLDERS.

See CORPORATIONS, 1, 2, 6, 7.

STRAYED ANIMAL.

See NEGLIGENCE, 10.

STREETS AND ROADS.

1. COUNTY ROADS IN EAST PORTLAND—CITY STREETS—LEGISLATION AFFECTING, CONSTRUED.—The act of October 25, 1872, conferring authority on the city of East Portland to control the public highways within its territory, and excepting the same "out of the jurisdiction of the county court of Multnomah county, does not have the effect to make all existing county roads within the city limits streets of the city, and liable to all the consequences of jurisdiction over them as such. *Heiple* v. *City of East Portland et al.* *Or.*, 639.
2. STREETS AND ROADS DEFINED.—The word "road" uniformly means a public highway. A "street" commonly refers to a public highway in a village or city, and ordinarily includes a sidewalk and roadway. *Id.*
3. THE SAME—WORK DONE BY CITY ON COUNTY ROADS.—Work done by a city on a county road within its limits will not make such road a city street, although the adjoining land-owners knew of and acquiesced in the work, when such work was not inconsistent with the proper use of highway as a county road. *Id.*

See DEDICATION, 1; MUNICIPAL CORPORATIONS, 1–3.

SUPPLEMENTAL PROCEEDINGS.

1. SUPPLEMENTAL PROCEEDINGS—ACTION AGAINST DEBTOR OF JUDGMENT DEBTOR—SECTION AUTHORIZING IS UNCONSTITUTIONAL.—The provision of section 720 of the code of civil procedure purporting to authorize the judge, by order, to permit the judgment creditor to institute and maintain an action against the alleged debtor of the judgment debtor is unconstitutional and void, for the reason that, by such section, no notice to the judgment debtor of the proceeding is provided for; otherwise the alleged debtor of the judgment debtor might be compelled to pay twice. *Bryant* v. *Bank of California*. *Cal.*, 213.

SURETYSHIP.

1. SURETYSHIP—PRIOR DEFAULT OF AGENT—FAILURE OF PRINCIPAL TO COMMUNICATE DISCHARGES SURETIES.—Sureties on a bond, given to secure the faithful performance of the duties of an agent, are not liable for a subsequent breach thereof, if, before the execution of the bond, the principal knew that the agent was a defaulter to him, and failed to communicate such knowledge to the sureties. *Guardian Fire and Life Assurance Co.* v. *Thompson et al.* *Cal.*, 464.

See APPEAL, 8–10; GUARDIAN AND WARD, 1–3; PUBLIC OFFICERS, 7–9.

SURPRISE.

See DEFAULT, 2.

SWAMP-LAND.

See ADVERSE POSSESSION, 5.

TAXATION.

1. ASSESSMENT OF REALTY—VOID IF PROPERTY IS NOT DESCRIBED.—An assessment of real estate which does not describe the property, but consists simply of the entry, "acres of land, 1,580; value of land, $1,680," is void. And money paid under protest, for a tax founded on such assessment, may be recovered back. *Holmes, Executor*, v. *School District No. 15. Or.*, 531.

2. TAXATION—ASSESSMENT TO CORPORATION—REFERENCE TO AGENT.—An assessment to the "Sulphur Bank Quicksilver Mining Company, F. Fiedler, agent," will be construed as being an assessment to the company, and that the reference to F. Fiedler, agent, was only to him as agent of the company. *Lake County* v. *Sulphur Bank Quicksilver Mining Co. Cal.*, 151.

3. THE SAME—SUPERINTENDENT OF COMPANY IS MANAGING AGENT—LIST OF TAXABLE PROPERTY FURNISHED BY—ESTOPPEL TO DENY SUFFICIENCY OF DESCRIPTION.—The superintendent of a mining company is the managing agent thereof, and, as such, is authorized, under sections 3629 and 3630 of the political code, to furnish the assessor a list of the taxable property of the corporation. And in an action to collect the tax, the corporation is estopped to question the sufficiency of the description of the real property assessed, if the same conforms to the description contained in the list furnished the assessor. *Id.*

4. THE SAME—JUDGMENT FOR AMOUNT OF TAXES—AMOUNT DUE STATE AND COUNTY MUST BE DISTINGUISHED.—In an action by a county to collect a tax for state and county purposes, the judgment should not be for a gross amount, but should distinguish between the amounts due the state and county respectively. *Id.*

5. SUPPLEMENTAL TAX ROLL—ASSESSMENT VOID, IF NO OPPORTUNITY IS GIVEN TO CONTEST AMOUNT.—Section 9, of the act of April 18, 1874, which attempts to provide for an assessment by the assessor of the city and county of San Francisco, which is arbitrary and absolute, without the possibility of equalization by the board of supervisors, as it provides for assessment to be made after the time within which the board can act, is violative both of the constitution of the state and of the fourteenth amendment of the constitution of the United States, in that it deprives the person assessed of an opportunity to appear before the board for the purpose of contesting the amount assessed against him. *People etc.* v. *Pittsburg Railroad Co. Cal.*, 27.

6. THE SAME—FAILURE TO FURNISH STATEMENT DOES NOT VALIDATE ASSESSMENT.—An assessment so made is invalid, although the person assessed failed to furnish the assessor with a list of his taxable property, as provided for by section 3629 of the political code. *Id.*

7. SUPPLEMENTAL TAX ROLL—ASSESSMENT VOID, IF NO OPPORTUNITY BE GIVEN TO CONTEST.—A supplemental assessment of personal property, made by the assessor of the city and county of San Francisco, under section 9 of the act of March 18, 1874, is void, and a tax founded thereon creates no lien. *Bowman* v. *Dewey. Cal.*, 209.

8. SUPPLEMENTAL TAX ROLL INVALID.—Judgment affirmed on authority of People v. Pittsburg R. R. Co., *ante*, page 21. *San Francisco* v. *Low. Cal.*, 242.

9. VOLUNTARY PAYMENT OF ILLEGAL TAX—NO ACTION LIES TO RECOVER.—A payment for taxes, based upon an illegal assessment, made in order to prevent the property assessed from being returned delinquent, is a voluntary payment, and cannot be recovered back by action. *Younger* v. *Board of Supervisors. Cal.*, 507.

10. THE SAME—POWER OF SUPERVISORS TO REFUND ILLEGAL TAX—MANDAMUS.—The power granted to the board of supervisors of a county, by section 3804 of the political code, to refund taxes illegally or erroneously collected, is judicial, and not ministeriall and after such board has heard and refused a petition for the refunding of a tax illegally collected, it cannot be compelled, by *mandamus*, to act contrary to its prior determination. *Id.*

11. TAX COLLECTOR OF SAN FRANCISCO—LIABILITY FOR ASSESSMENTS FOR OUTSIDE LANDS.—For money paid to a tax collector of the city and county of San Francisco, in payment of an assessment levied under order 800 of the board of supervisors, the tax collector's liability to a claimant thereof was as tax collector and not as an individual, and it was his duty to pay it to such claimant upon demand. *Lawrence* v. *Doolan, Administrator et al. Cal.*, 556.

12. THE SAME—STATUTE OF LIMITATIONS, WHEN RUNS AGAINST CLAIMANT.—The statute of limitations did not commence to run against such claimant, and in favor of the sureties on the bond of the tax collector, until it was judicially determined whether or not the claimant was the person to whom the city would deed the land assessed, and might take the money paid to the tax collector and apply it to the purpose con-

templated by order No. 800, and the acts of the legislature of March 27, 1868, and of March 14, 1870. *Id.*

13. THE AMENDMENT OF SECTION 9, ARTICLE 13, OF THE CONSTITUTION OF 1879, was properly adopted. *People ex rel., etc.* v. *Strother, Auditor, etc. Cal.*, 36.

See CONSTITUTIONAL LAW, 2, 6–8; MORTGAGE, 10.

TENANTS IN COMMON.

See ADVERSE POSSESSION, 2; PUBLIC LANDS, 12.

TENDER.

1. TENDER AND PAYMENT INTO COURT ONLY ADMITS the cause of action as to the sum tendered. It does not conclude the defendant as to any defense he may have against a further recovery. *Simpson* v. *Carson. Or.*, 637.

See CONTRACT, 3.

TERMS.

See AMENDMENT, 1.

TERRITORIES.

1. CONGRESS HAS SUPREME CONTROL OF ALL THE TERRITORIES, and laws enacted by it for their government are supreme, any law of a territory to the contrary notwithstanding. *Wenner* v. *Smith. Utah*, 746.

TIDE-LANDS.

1. TIDE-LANDS DEFINED.—Tide-lands are lands lying between ordinary high-water and low-water mark, and which are alternately covered and left dry by the ordinary flux and reflux of the tides. Lands which are covered with water three fourths of the year cannot be considered as such. *Andrus* v. *Knott et al. Or.*, 742.

TRADE-MARK.

1. MARK TO DESIGNATE GOODS—FRAUDULENT IMITATION OF WITH INTENT TO DECEIVE INJOINED—TRADE-MARK.—Where one person who has established a business for his goods, carries it on under a given name or with a particular mark, it is a fraud on him for some other person to assume the same name or mark, or the same with a slight alteration, in such a way as to induce persons to deal with him in the belief that they are dealing with the person who has given a representation to the name or mark. In such case equity will enjoin the fraudulent use of such name or mark, whether the same constituted a trade-mark or not. *Pierce* v. *Guittard et al. Cal.*, 232.

TRANSCRIPT.

See APPEAL, 7, 18, 19, 21, 23; CRIMINAL LAW, 6.

TREATY.

See CONSTITUTIONAL LAW, 9.

TRESPASS.

1. CROSS-COMPLAINT—ALLEGATION OF TRESPASS ON LAND.—A cross-complaint states a cause of action for trespass to defendant's lands, if it shows actual possession by the defendant at the commencement of the action of certain land and premises inclosed by a good and substantial inclosure; unlawful entry thereon by the plaintiff with bands of sheep, with which he, against the consent of defendant, depastured

the land to his damage. A further allegation that such trespass was committed "contrary to the provisions of an act of the legislature of the state of California, entitled 'An act to restrict the herding of sheep,' approved May 18, 1861,'" may be disregarded as surplusage or stricken out. *Demartin* v. *Albert.* *Cal.*, 568.

2. THE SAME—CROSS-COMPLAINT—TRESPASS TO LAND—ACTION FOR PERSONAL INJURIES. In an action to recover damages for injuries inflicted on plaintiff's sheep, the defendant cannot file a cross-complaint to recover damages for a trespass committed on his land, when there is nothing in the pleadings to show that the respective trespasses of the parties related to, or depended upon, or in any way affected each other. *Id.*

See RIGHT OF WAY, 1.

TRIAL.

See CONTINUANCE; CRIMINAL LAW, 5, 20; EJECTMENT, 2, 4.

TRUST.

1. CONSTRUCTIVE TRUST.—Where one party, wrongfully, obtains the legal title to land, which, in equity and good conscience, belongs to another, whether he acts in good faith, or otherwise, he will be charged, in equity, as a constructive trustee of the equitable owner. *Lakin* v. *Sierra Buttes Gold Mining Co.* (*U. S. Cir. Ct.*) *Cal.*, 50.
2. TRANSFER OF REAL PROPERTY—CONSIDERATION PAID FOR ANOTHER.—Under section 853 of the civil code, where a transfer of real property is made to one person, and the consideration thereof is paid *for* another, a trust is presumed to result in favor of the person for whom the consideration is paid. It is not necessary that the consideration should have been paid *by* him. *Barriolhet* v. *Anspacher.* *Cal.*, 323.
3. THE SAME—CESTUI QUE TRUST IN POSSESSION—LACHES.—Such *cestui que trust*, while in possession, is not guilty of laches in not asserting his rights against the holder of the legal title out of possession. *Id.*
4. ACTION TO DECLARE TRUST—NOTICE OF PLAINTIFF'S EQUITIES—BURDEN OF PROOF.—In an action against the holders of the legal title to land, to charge them with a trust in favor of the plaintiff, when the complaint expressly alleges that the defendants, at the time of their purchase, took with notice of the plaintiff's equities, it is necessary for the plaintiff to prove facts showing such notice, when there is nothing shown of record to put the defendants on inquiry. *Wyrick et al* v. *Wick et al.* *Cal.*, 174.

ULTRA VIRES.

See CORPORATIONS, 3.

UNDERTAKINGS.

See APPEAL, 2, 4, 5, 8–11, 13, 14, 16; REPLEVIN, 3.

UNITED STATES COURTS.

1. JURISDICTION TO ENJOIN PROCEEDINGS IN STATE COURT.—The United States circuit court has no authority to restrain the chief of police of San Francisco from serving warrants of arrest issued by the police court upon criminal charges for violating city ordinances, alleged to have been passed in contravention of the fourteenth amendment of the constitution of the United States, and of the stipulations of our treaty with China. *Yick Wo* v. *Patrick Crowley.* (*U. S. Cir. Ct.*) *Cal.*, 715.
2. SECTION 720 OF THE REVISED STATUTES prohibits the issue of injunctions to restrain proceedings in the state courts. *Id.*

See INTERPLEADER; REMOVAL, 7; CAUSES, 1; REPLEVIN, 3.

VACANCY.

See ATTORNEY-GENERAL; INSANITY; PUBLIC OFFICERS, 10.

VALUE.

See CLAIM AND DELIVERY, 2.

VARIANCE.

1. VARIANCE—EVIDENCE SUSTAINED BY ANSWER.—A variance between the facts proved and those alleged in the complaint is immaterial, if the answer set forth the facts as they appeared in evidence. *Thompson* v. *Reno Sav. Bank. Nev.*, 634.

See APPEAL, 20.

VENDOR AND VENDEE.

See PRINCIPAL AND AGENT, 9–11.

VENUE.

1. MURDER—CHANGE OF VENUE—PREJUDICE AGAINST DEFENDANT.—Where a motion for a change of venue, in a prosecution for murder, is made, on the ground of prejudice against the defendant in the county where the indictment was pending, which would prevent him from having a fair and impartial trial, the court may deny the motion, until it can be shown by an examination of a sufficient number of jurors whether a fair and impartial jury can be obtained or not. *State* v. *Gray*. *Nev.*, 72.

VERDICT.

1. VERDICT—CONFLICT OF EVIDENCE.—A verdict will not be disturbed on the ground of insufficiency of the evidence to sustain it, when the evidence is conflicting. *People* v. *Brick*. *Cal.*, 427.
2. VERDICT OF CONVICTION NOT DISTURBED WHEN EVIDENCE IS CONFLICTING.—A verdict convicting the defendant will not be disturbed because contrary to the evidence, when the preponderance of the evidence went to prove the defendant's guilt. *People* v. *Jones*. *Cal.*, 200.
3. WHEN THE EVIDENCE IS CONFLICTING THE VERDICT will not be disturbed. *Bulkeley* v. *Bank of Cal*. *Cal.*, 212.
4. RECOMMENDATION TO MERCY.—The refusal of the court to strike from the verdict a recommendation to mercy, is not error. *State* v. *Gray*. *Nev.*, 72.

See CLAIM AND DELIVERY, 2, 3; CRIMINAL LAW, 12, 19; DAMAGES, 1; MURDER AND MANSLAUGHTER, 10; NEW TRIAL, 15; NEGLIGENCE, 11.

WAGER.

1. AT COMMON LAW WAGERING CONTRACTS WERE NOT ILLEGAL, unless contrary to public policy, morality, or the like. *Mesner* v. *Knapp et al*. *Or.*, 648.
2. TO CONSTITUTE A WAGER THERE MUST BE TWO OR MORE contracting parties having mutual rights in respect to the thing wagered, and each of the parties necessarily risks and has a chance to make something upon the happening or not of an uncertain event. *Id.*
3. THE SAME—PURSE OFFERED ON HORSE-RACE.—A purse or prize offered by a party, and to be awarded to the successful competitor in a contest, such as a horse-race, in which such party does not engage, is not a wager. *Id.*

WAREHOUSEMAN.

1. WAREHOUSEMAN'S RECEIPT—ASSIGNMENT OF—CONSTRUCTIVE DELIVERY.—When the terms of a warehouse receipt are such that the warehouseman offers or undertakes to deliver the property to whomsoever the receipt may be indorsed, a symbolical delivery may be affected by its assignment or delivery, and he becomes bailee to such

assignee, in accordance with the terms of his contract. In such case a delivery of the receipt is a symbolical delivery of the property itself. But when the receipt restricts the promise to deliver to the bailor personally, and not to his order, a change in possession of the property bailed cannot be affected by a mere assignment of the receipt, without the consent of the bailee thereto, so as to defeat the rights of subsequent attaching creditors to the bailor. *Gill* v. *Frank. Or.*, 413.

2. WAREHOUSE RECEIPTS—BONDED WAREHOUSE—BRANDY STORED IN NAME OF DISTILLER.—Plaintiff was the owner of the brandy in controversy. It was manufactured for him by one B., a licensed United States distiller, and in order to delay payment of the revenue tax, was stored by him in a United States bonded warehouse, controlled and regulated by the act of congress of March 3, 1877, and the special treasury regulations of May 15, 1877. Such laws require the brandy to be stored in the name of the distiller, but do not require that the distiller shall be the owner. The warehouse receipt was issued to B. in his own name. Subsequently B., without authority, sold the brandy to the defendant, and transferred the receipt to him. The defendant was a *bona fide* purchaser for value and without notice. *Held*, that the plaintiff was entitled to a return of the property, upon paying to the defendant the amount of the warehouse charges and the government tax paid by him. *Bliss* v. *Carroll. Cal.*, 506.

WAIVER.

SEE CONTINUANCE, 4; EJECTMENT, 2; FINDINGS, 8; NEW TRIAL, 8, 9; PLEADINGS, 5; STATUTE OF LIMITATIONS, 10, 11.

WARRANTS.

See CONSTITUTIONAL LAW, 4–8; SEARCH-WARRANT.

WARRANTY.

1. SALE OF MANUFACTURED ARTICLES—WARRANTY OF FITNESS—RESCISSION OF CONTRACT.—Plaintiffs sold to the defendant a harvesting machine of their own manufacture, and guaranteed, in writing, "that it would do good work in cutting and thrashing ordinary grain;" they also agreed to send a man with the machine, to start it, "and show to the defendant's satisfaction that it was all that they represented it to be." The machine was shipped by rail to the defendant; upon its arrival he carefully adjusted it, and commenced to haul it away, when it broke down, so that it could not be moved; he immediately notified the plaintiffs, who forwarded a duplicate of the broken part; this was adjusted, and the machine started, when it again broke down in the same manner. The defendant thereupon immediately notified the plaintiffs of his refusal to accept the machine. In an action to recover the purchase-price of the machine, *Held*, that under sections 1679 and 1770, of the civil code, as well as under the written guaranty, the plaintiffs warranted the machine to be reasonably fit for the purpose intended, and to be free from any latent defects, arising from the process of manufacture, not disclosed to the defendant; that upon a breach of such warranty the defendant was entitled to rescind the sale by returning, or offering to return, the machine, and that a refusal to so instruct the jury was error. *Hoult et al.* v. *Baldwin. Cal.*, 17.

WATER RIGHTS.

See INJUNCTION, 4, 5; RIPARIAN PROPRIETORS, 1.

WEARING APPAREL.

See EXECUTION, 1.

WITNESS.

1. EVIDENCE—VOLUNTARY WITNESS—NONPAYMENT OF FEES.—The facts that a witness was not subpœnaed by the party calling him, and attended the trial from a distance,

without any fees being paid to him, are not of sufficient importance to justify the jury in drawing any inference therefrom prejudicial to the witness. *Hurst* v. *Burnside*. *Or.*, 446.

2. WITNESS FALSE IN PART—JURY MAY DISREGARD.—The jury, if they believe that any witness has willfully testified falsely to any material point in the case, are at liberty to disregard the entire testimony of such witness. *Minich* v. *People*. *Col.*, 580.

See CONTINUANCE, 1–3; CRIMINAL LAW, 8; EVIDENCE, 18–20.

WRIT OF REVIEW.

See CERTIORARI.

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